SHORELINE FOR THE PUBLIC

A Handbook of Social, Economic, and Legal Considerations Regarding Public Recreation in the Nation's Coastal Shoreline

by

DENNIS W. DUCSIK

S.B., S.M., Massachusetts Institute of Technology
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Certified by .....
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Accepted by .....
Chairman, Departmental Committee on Graduate Students

ABSTRACT

Our nation faces a serious shortage of public recreational opportunities along the coastal shoreline. This shortage has materialized as a mushrooming demand for the unique and relatively scarce resources of the coastal environment has far outstripped the effective supply. A pattern of economic growth and private development in coastal areas has continued unchecked for the past three hundred years, so that now we find only a small percentage of the entire shoreline in public hands for recreation. Furthermore, the problem is compounded by pollution, erosion, and the increasing tendency of private owners to restrict access in areas traditionally available for public use. But while the supply is limited, the demands increase at a breakneck pace. The multiplicative effects of increasing population, income, leisure time, and mobility are expected to bring about a tripling in the demand for outdoor recreation by the turn of the century. Yet the facilities, especially those involving water-oriented activities, are saturated now with hordes of users.

The source of the shoreline recreational problem lies in the institutional mechanisms that historically have been relied on to allocate scarce resources amon competing uses. This "allocative system" consists of the competitive private market and local governmental units, both of which, under certain circumstances, can be shown to under-represent certain important social values while over-representing others. The circumstances leading to allocative imperfection include: (1) the inability of the price system to determine and articulate the true costs and benefits to society associated with the use of common-property resources; and (2) the tendency of municipal officials to make decisions governing the use of resources of more-than-local significance solely on the basis of local needs and values. In sum, the historical organization of economic and political activity gives rise to systematic forces which, if left unadjusted, tend to misallocate resources on a large scale. This is what has happened in the coastal shoreline: public beaches and recreational open spaces have not been sufficiently provided while private development has soared; water qualtiy has not been maintained as industrial and municipal wastes have made sewers out of most estuaries; and many ecologically-important wetlands have not been protected from indiscriminate dredging and filling. At the same time, governmental action at higher levels has frequently been a classic case of too little and too late.

Recent legislation at the federal level expresses concern over the coastal resource situation —including the problem of decreasing open-space for public recreational use —and encourages the states to develop management programs to make wise use of coastal lands and waters. The search for manageable solutions to the shoreline recreation component of this broad mandate must begin with an analysis of the legal regimes governing public vs. private rights in seashore areas. As it turns out, public recreational rights in the waters, tidelands, and submerged lands of most coastal states are relatively firmly established. The larger part of the problem of public rights stems from private ownership of littoral property in upland areas, above the line of mean high tide. Since the shoreline cannot be effective as a complete

(abstract continued)

recreational resource without the availability of uplands held by shorefront proprietors, any discussion of public use must focus on the legal principles applicable to this portion of the seashore.

In recent years, progressive courts in a few states have employed a variety of common-law doctrines to confirm public recreational rights both in private and municipal areas traditionally open to use by the public at large. While judicial activity has played a significant role in calling attention to the recreation problem and stimulating legislative response, it cannot be relied on as an effective tool of public policy in the long run. The major difficulty is that reliance on judicial determination of the public interest on a case-by-case and jurisdiction-by-jurisdiction basis interjects enormous uncertainty into what should be a coherent and orderly planning process. Striking a balance among public recreation, private recreation, conservation, and other uses of the coastal shoreline is a management problem and as such is the proper domain of the legislatures and their duly-authorized administrative agents.

Since a beach is essentially an open space and a public beach a public park, the legal tools available in the formation of public policy are basically those which have been applied in the areas of open-space and recreational planning. The most direct and frequently used method of securing shoreline areas for public use is to buy them, either through purchase or condemnation of the fee simple or an easement. While government acquisition programs are the most desirable means of providing recreation facilities in the long-run, there is a need to apply more flexible legal mechanisms to preserve the open-space character of the shoreline in the short-run. If beaches and other prime recreational shorelands currently under private ownership are ever to be "reclaimed" for public use, they will have to be regulated so as to prevent construction on at least that portion of the beach most appropriate for public use, i.e. the dry sand area between the water's edge and the line of vegetation. Having examined the constitutional limitations of the regulatory power with respect to open space objectives, it seems clear that a number of land-use controls can be utilized in the shoreline situation. Exclusive-use zoning, setback lines and official mapping, subdivision exactions, compensable regulation, and tax techniques are all potentially effective means of preserving the seashore as a unique open-space resource; and carefully-drafted ordinances regulating seashore use stand a good chance of weathering constitutional storms with regards the issue of taking withou due process of law.

Decreasing open space for public recreational use is prototypical of the complexity of coastal resource management issues. This report isolates the economic and political causes of the problem and evaluates the legal techniques available to carry out public policies that are designed to solve it. But the process of making equitable and efficient choices among policy alternatives entails consideration of a wider range of practical decision-making issues, which are outlined and then consigned to future efforts.

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CHAPTER ONE

Introduction

The integral relationship between man and environment is perhaps best exemplified by his long and close association with the sea, which has traditionally been relied upon as a means of transportation, a source of food, and a sink for the disposal of wastes. In America, the early settlements that were established around the natural harbors of the coastal shoreline[1] -- our gateway to the sea -- have since grown into the thickly-populated metropolitan areas of today. Recent census data indicate that fifty-four percent of the nation's population presently live within the fifty mile coastal strip[2] that comprises but eight per cent of the total U.S. land area. Moreover, the distribution of population has been shifting steadily towards this marine perimeter[3] as employment opportunities have expanded with the rapid growth of economic

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[1]Coastal shoreline refers to the land-sea interface of the contiguous states which border on the Atlantic and Pacific Oceans, the Gulf of Mexico, and the Great Lakes.

[2]This figure excludes Alaska and Hawaii. U.S. Dept. of Commerce, Bureau of the Census, Statistical Abstract of The United States - 1972, Table No. 4, at 6.

[3]Id.

activity in coastal regions. While the nature of this activity has changed as our industrial economy matured, the land-sea interface has retained its significance as a vital link between American society and the resources that sustain its vitality.[4]

Throughout its historical period of development, the coastal shoreline was viewed as relatively limitless in its capacity to support multiple endeavors. Only in the last decade has this attitude begun to change, as the nation experiences a growing consensus of dissatisfaction with trends in the utilization of its environmental resources, especially those in coastal areas where pressures for development are the greatest. While attention to air and water pollution has dominated legislative responses to date, we are now arriving at a more sophisticated understanding that the use of land is the key ingredient in environmental management. This understanding has led to the passage into law of the Coastal Zone Management Act of 1972[5], which recognizes that important

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[4] Consider, for example, the relationship between the shoreline and energy-related activities. For many American ports, petroleum shipments account for a high percentage of total throughput, and deep-water terminals connected to on-shore facilities are on the horizon. Power plants are increasingly located on the coast to utilize the water for cooling purposes, and offshore stations are in the planning stage. Finally, drilling for offshore oil is expected to grow, and on-shore refineries will be required to produce the needed domestic supplies of refined products.

[5] Public Law 92-583 (October 27, 1972).

ecological, recreational, cultural, historic, scenic, natural and aesthetic attributes of coastal areas are being irretrievably lost or damaged in the face of growing demands for economic development. These "amenity values" have been deemed by the Congress as "essential to the well-being of all citizens", and must now be considered along with traditional economic values in decision-making processes which govern the allocation of scarce coastal resources. But the question remains: Are these processes, as presently constituted, capable of striking a socially-optimal balance between conservation and development, between private rights and public use? This issue of the adequacy of existing institutional arrangements is at the heart of the matter, and it is the cause of deep concern.

The problem of decreasing coastal open space for public use, especially for recreational purposes, has been highlighted by the Congress[6] and typifies the complexity of the coastal management problem. In potential conflict are the needs for expanded recreational opportunities for the public (especially in urban areas) on the one hand, and the desire for intensive private development on the other. And both of these activities are constrained by the existence of powerful natural forces as well as fragile ecological systems.[7] The land-water edge is

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[6] Id. at s. 302d.

[7] See generally Shephard and Wanless, Our Changing Coastlines (1971); E. Odum, Fundamentals of Ecology (2d. ed. 1959); R. Parson, Conserving American Resources (2d. ed. 1964).

thus characterized by an interlocking web of specific individual concerns and diffuse social and ecological interests. Yet, the economic and legal regimes regulating man's activities in this zone were historically intended to protect and serve only the interests of individuals in their dealings with each other, and have not always been well-suited to maximize the broader social welfare.[8] Part of this welfare is the opportunity for the general public to have access to and enjoy the unique features of the shoreline, a natural resource that has been recognized for centuries as properly the "common property of all." Justinian, an ancient Roman scholar, put it this way:

> "Et quidem naturali jure communia sunt omnium haec, aer, aqua profundus, et mare et per hoc littora maris" -- By natural law itself these things are the common property of all: air, running water, the sea, and with it the shores of the sea.[9]

Unfortunately, the American coast has been so exposed to the pressures for private development that only a meager six per cent is now in public ownership for recreation.[10] While the public has not always been excluded from private areas, there is a growing tendency for private owners to

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[8] See discussion infra, Chapter 4, at p. 53 et seq.

[9] Justinian, Institutes Lib.II, ch. 1, s. 1.

[10] Geo. Washington University, Shoreline Recreation Resources of the United States, Outdoor Recreation Resources Review Commission Study Report No. 4, at 11 (1962).

restrict access as the number of users increase. And even those areas that are in public ownership are not always available to the general populace, as some coastal municipalities exclude non-residents through discriminatory parking fees or similar devices. Finally, pollution and erosion take a steady toll of what limited stretches are available to the public, and the remaining facilities are saturated with hordes of users. So, at a time when the needs for recreation near urban areas are intensifying, the coastline as a public commodity is fast becoming one of the most scarce of all natural assets!

This report is motivated by the continual worsening of the shoreline recreational situation. Its objectives are twofold: to develop an understanding of the nature of the public vs. private recreation problem and its causal factors (Part One)[11]; and to examine some of the tools that are available for the implementation of public policy in this regard (Part Two). In the process, we shall explore fully the economic, political, and legal regimes surrounding the allocation and use of the shoreline for private and public purposes. It must be

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[11] The analysis in Part One is based in part on previous work by the author, including: Power, Pollution, and Public Policy, MIT Press, at Chapters 1 and 3 (Ducsik ed., 1972); "The Crisis in Shoreline Recreation Lands", Papers on National Land Use Policy Issues, U.S. Senate Committee on Interior and Insular Affairs (1971); and "Understanding the Allocative System: A Framework for the Management of Coastal Resources", presented at 8th Annual Conference of the Marine Technology Society (1972).

pointed out, however, that this is but an initial cut at the problem, intended only to lay the groundwork for the formulation of public policy guidelines. Isolating a problem and evaluating the techniques available to carry out its solution are necessary but not sufficient components in the process of making equitable and efficient choices among policy alternatives. In the course of this treatment, a wide range of additional decision-making issues will be identified but then consigned to future efforts.

Before proceeding into the body of this report, a word about philosophy of approach is in order. While solid arguments can be made in favor of expanding public recreational opportunities in the nation's shoreline, we must always bear in mind that advances in this particular sector of the public welfare will never be without costs to other sectors. More public recreation in coastal areas may threaten certain conservation objectives or come at the expense of established private interests. In assessing this tradeoff, we must remember two things. First, while man is a social being performing social activities like recreation, he is also a biological organism whose survival as a species depends on the maintenance of an intricately complex, ecological balance among himself and all other plant and animal species within their respective geologic and climatic environments.[12] The many forms of fish

[12] See Webber, et al., Trends in American Living and Outdoor Recreation, U.S. Outdoor Recreation Resources Review Commission Study Report No. 22, at 248 (Wash. D.C. 1962).

and wildlife found solely in the coastal and estuarine zones are an integral part of this ecosystem, together with all other life-forms that exist in the beach, bluff, and wetland areas of the shoreline. There is a clear and pressing need to preserve the vitality of all such ecological systems, at the very least until man can determine their ultimate importance as a component part of his own life cycle and those of other forms of life on this planet. The second thing we must remember is that existing property rights are built on expectations that have not enjoyed the long-standing protection of the law without good reason.[13] This is the doctrine that an ounce of history is worth a pound of logic, and it has succinctly been applied to recreation planning by a leading writer in the field, who has observed:

> ... any attempted solution to the problem of satisfying public recreational needs which fails to recognize the present pattern of private rights, or the need to effect change in an orderly and planned manner, must fail.[14]

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[13] As the legal scholar Blackstone noted:

> There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.

1 Cooley's Blackstone 321 (Book II, Ch. 1 of W. Blackstone, Commentaries on the Law of England). While this notion of property rights may be somewhat outdated in the strictly legal sense, it serves to illustrate the fervor with which some individuals view their command over the resources of the earth.

[14] Reis, "Policy and Planning for Recreational Use of Inland Water," 40 Temple L.Q. 155, at 180 (1967).

Hopefully, adherence to this concept, coupled with a recognition that untrammelled public use is the surest way to despoil a fragile ecological resource, will help keep the analysis contained herein as balanced and productive as possible.

PART ONE

The Social and Economic Dimensions of the Shoreline Recreation Problem

CHAPTER TWO

The Need and the Demand for Shoreline Recreation Opportunities

1. The Need for Outdoor Recreation

Since the earliest days of planning for outdoor recreation, great emphasis has been laid on the value of outdoor recreation in helping "cure" the ills of society. Many advocates of outdoor recreation described parks, playgrounds, beaches, and other opportunities for recreational activity as "veritable cure-alls which would isolate young people from and immunize them against the delinquency, alcoholism, prostitution, and crime that abounded in the slums."[1] In later years, the emphasis shifted to the value of outdoor recreation in counteracting the harmful effects of the stress and tensions of life in an urban-industrial society. Recreation generally came to be viewed as a major solution to the problems of mental illness that were attributed to such tensions.

Herbert Gans, the noted sociologist, has taken issue with this orientation towards a causal link between recreation and mental health:

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[1]Gans, People and Plans, Basic Books, Inc., New York, N.Y. at 109, (1968).

> . . . (These attitudes were) developed by a culturally narrow reform group which was reacting to a deplorable physical and social environment and rejected the coming of the urban-industrial society. As a result, it glorified the simple rural life and hoped to use outdoor recreation as a means of maintaining at least some vestige of a traditional society and culture. Given these conditions and motivations, no one saw fit to investigate the relationship between outdoor recreation and mental health empirically.[2]

How then can we go about determining what relationship, if any, exists between recreation and mental health, or, in broader terms, the general health and well-being of man in modern society? Most psychologists and sociologists would concur that the human predicament can best be described as the task of maintaining a balance, both internally and externally, between man's existence as an organism and as a personality. This predicament has been described by Lawrence K. Frank:

> So long as man lives, he must function as an organism through his continual intercourse with the natural environment, breathing, eating, eliminating, sleeping, and sexual functioning as a mammalian organism. Thus, as an organism, man is continually exposed to a variety of biological and psychological signals to which he is more or less susceptible; but, as a personality, he must strive to live in his symbolic cultural world, exhibiting the orderly patterned conduct and required performance in response to the symbols and rituals of his social order. He finds himself often

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[2] Id.

> "tempted" by these potent biological signals but continually reminded by the symbols and especially by the expectations of other persons, of the group-sanctioned code of conduct he is expected to observe. This conflict is lifelong and apparently inescapable unless the individual withdraws completely from social life in some form of mental disorders. A crucial problem for mental health is how an individual can resolve this conflict without incurring high costs psychologically and persistent damage to his personality, and what sources he can rely upon for strength and renewal in facing his life tasks. (Emphasis added)[3]

In this spirit, Herbert Gans has described mental health as "the ability of an individual as an occupier of social roles and as a personality to move toward the achievement of his vision of the good life and the good society . . . mental health is a social rather than an individual concept, because if society frustrates the movement toward the good life, the mental health of those involved may be affected.[4] There are considerable present-day indications that society does tend in many ways to frustrate an individual's movement toward the good life, and that it is increasingly difficult to maintain the balance necessary for well-being as described above. The characteristics and intensity of the emotional stresses and strains of modern life have been stated (and sometimes overstated) by many writers. There can be no doubt that the pollution, congestion, noise, and other social ills of the urban

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[3] Frank, et al., Trends in American Living and Outdoor Recreation, U.S. Outdoor Recreation Resources Review Commission (ORRRC) Study Report No. 22 (1962) at 249.

[4] See Gans, op. cit. note 1 supra, at 112.

environment detract from the well-being of those who live and work in metropolitan areas. These "sensory overloads" have particularly severe effects on the low-income, less mobile groups that now dominate the central cities, where the overload is compounded by extreme crowding and oppressive living conditions, by widespread nutritional inadequacies, and by the frustrations of unemployment, drug addiction, and high crime rates.

Having established that health can best be understood as a product of the interaction between an individual and the total physical and social environment that he experiences, and recognizing some of the impediments to the maintenance of a healthy sociological balance in this interaction with present-day society, we must now ask: What part can outdoor recreation play in helping the individual maintain this balance so vital to his mental health and physical well-being? Once again, it is Gans who provides us with the most incisive approach:

> . . . the recognition of the limited significance of outdoor recreation in the treatment of personality disorders should not blind us to the potential significance of it for developing and sustaining healthy personalities. Indeed, we may find that recreation, especially outdoor recreation, provides one of the most promising approaches to the elusive goal of mental health as a form of "primary prevention" of mental ill health. In and through outdoor recreation the individual, especially in early life, may develop the self-confidence, the elasticity, and spontaneity for action and expression of feelings which will enable him to cope with city living and indoor working, while maintaining his physical and mental health.[5] (Emphasis added)

[5] Id.

So, while the arguments for the psychological and emotional need for outdoor activity may have been overstated[6], it seems clear that outdoor recreation can be a renewing experience, a refreshing change from the working routine. But the view each individual takes of outdoor recreation depends on his preferences and personality, is conditioned by his physical and economic environment, and is influenced by his age and sex. From this we can see that the collection of more extensive data on leisure behavior is immensely important, since the formation of long-term outdoor recreation policy presents a wide variety of sociological issues not easy to define or resolve. Laurence Frank has suggested[7] that we can better plan for recreation if we can discover what needs and aspirations people are trying to fulfill and if we can recognize what may be blocking or frustrating their quest. But in the absence of empirical evidence on these questions, what should be our approach to planning? The fact that the demand for outdoor recreational activity is strong and increasing rapidly suggests that we should adopt a user-oriented approach.

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6 " . . . it is by no means clear that everyone, or even a majority of persons, suffers from severe strains and stresses; moreover, a substantial proportion of the population apparently rarely or never engages in outdoor recreation . . . Although much is made of the increase in tension and strain, yet it is a fact that no comprehensive continuous effort has ever been made to measure these factors."

Clawson and Kretsch, The Economics of Outdoor Recreation, Johns Hopkins Press, Baltimore, Md. at 31, (1966).

7 See Frank, op. cit. note 3 supra, at 220.

As one commentator has pointed out:

> . . . to ask whether outdoor recreation is important to the mental health of Americans is, in one sense, tantamount to asking whether the full and rich life is important; and the answer of course is clear . . . the degree of crowding at our parks, our ski slopes, beaches, picnic sites, and even our mountain trails is clear evidence of the popular response to this question.[8]

What then, is the demand for outdoor recreational opportunities, and which facilities are used and preferred by those who seek this satisfying leisure-time activity?

2. The Demand for Outdoor Recreation

Recreation has always been a prime objective of American life; indeed, the "pursuit of happiness" is firmly established in the Declaration of Independence as a basic human right. It has been noted that most Americans, when given the opportunity to diminish their "sensory overload" through a change of routine, "will spend a summer afternoon in a suburban backyard around a barbecue, in a city park, or at the nearest swimming pool or beach. Given the chance and the means for a weekend or a vacation away from home, they will take to the country, the mountains, or the seashore."[9] It is not surprising, then,

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[8] Webber, et al., Trends in American Living and Outdoor Recreation, U.S. Outdoor Recreation Resources Review Commission, Study Report No. 22 at 249, (1962).

[9] Id.

that the demand for outdoor recreation is surging, spurred on by increases in the causal factors of population, disposable income, leisure, mobility, education, and overall standard of living. The Outdoor Recreation Resources Review Commission (ORRRC), in a report to Congress in 1962 entitled Outdoor Recreation for America,[10] noted and documented these causal factors and their influence on recreational demands. It was the conclusion of this report that, as the levels of these factors rose, the growth of outdoor recreation demand would accelerate even faster, and in a sustained fashion, than the net increase in population:

> Whatever the measuring rod . . . it is clear that Americans are seeking the outdoors as never before. And this is only a foretaste of what is to come. Not only will there be many more people, they will want to do more and they will have more money and time to do it with. By 2000 the population should double; the demand for recreation should triple.[11]

By 1965, it was clear that these projections significantly underestimated the mushrooming demand. A survey conducted by the Bureau of Outdoor Recreation found that increases in major summertime outdoor recreation activities over the period 1960-1965 has "far surpassed" the earlier predictions; and revised projections indicated that participation in

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[10] U.S. Department of the Interior, Bureau of Outdoor Recreation, Outdoor Recreation for America, A Report to the President and Congress by the Outdoor Recreation Resources Review Commission (1962).

[11] Id.

these activities would be quadruple the 1960 level by the year 2000.[12] These trends translate into a ten to twelve per cent annual increase in the use of public recreation areas.[13]

In addition to outlining the general trends in outdoor recreation activity, the 1960 survey documented the patterns in demand as expressed by participation rates and user days. These indicators are listed in Table 1 for various outdoor activities. An examination of these and other related data[14] reveal a number of interesting trends. The first major trend of note is that Americans most frequently participate in simple activities that are usually independent of age, income, education, or occupation. Driving and walking for pleasure, playing outdoor games, swimming, and sightseeing lead the list of outdoor pursuits in annual days of activity per person, with driving and walking together accounting for almost forty-three per cent of these days. A second trend of importance is the great demand for activity close to home. People seeking outdoor recreation do so within definite

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[12] U.S. Bureau of Outdoor Recreation, 1965 Survey of Outdoor Recreation Activities, (Washington, D.C.; U.S. Gov't. Printing Office, 1967).

[13] Over the period 1920-1964, national park attendance rose from one million to one hundred million. From 1942-1964, state park attendance increased from sixty-nine million to two hundred eighty-five million. Clawson, op. cit. note 6 supra, at 5.

[14] See U.S. Outdoor Recreation Resources Review Commission, National Recreation Survey, Study Report No. 19 (Wash. D.C. 1962).

	Per Cent Participating* (Summer '60)	Days Per Participant* (Summer '60)	Days Per Person* (Summer '60)	Days Per Person* (Annual '60)
Physically Active Recreation of Youth:				
Playing Outdoor Games & Sports	30	12.3	3.63	12.71
Bicycling	9	19.4	1.75	5.17
Horseback Riding	6	7.5	.42	1.25
Water Sports:				
Swimming	45	11.5	5.15	6.47
Canoeing	2	3.0	.07	.12
Sailing	2	3.0	.05	.11
Other Boating	22	5.5	1.22	1.95
Water Skiing	6	5.1	.30	.41
Fishing	29	6.8	1.99	4.19
Backwoods Recreation:				
Camping	8	5.7	.46	.86
Hiking	6	4.4	.26	.42
Mountain Climbing	1	3.7	.04	.09
Hunting	3	5.6	.19	1.86
Passive Outdoor Pursuits:				
Picnicking	53	4.0	2.14	3.53
Walking for Pleasure	33	13.1	4.34	17.93
Driving for Pleasure	52	12.7	6.68	20.73
Sightseeing	42	5.2	2.20	5.91
Attending Outdoor Sports Events	24	5.5	1.32	3.75
Nature Walks	14	5.2	.75	2.07
Attending Outdoor Concerts	9	2.4	.21	.39
Miscellaneous:	5	8.4	.40	.57

*Rates shown are for persons twelve years and over

Source: U.S. Outdoor Recreation Resources Review Commission, National Recreation Survey, Study Report No. 19 (Wash. D.C. 1962).

Table 1 Patterns of Demand for Selected Outdoor Recreation Activities in the U.S. - 1960

time periods that can be classified as day outings, weekend or overnight trips, and vacations. The most frequent of these is the day outing, which is presently considered the fundamental unit of outdoor recreation. Most indications are that people will drive one way about two hours -- a distance that may vary from 30 miles to as much as 90 miles -- for such outstanding recreation sites as ocean beaches or scenic campgrounds. For the weekend or overnight outing, the median travel distance is about 90 to 125 miles. While some vacationers will travel many miles on week- or two-week-long vacations, by far the greatest demands are placed on the facilities serving daily and weekend outings. Hence, pressures are greatest within about 125 miles of metropolitan centers, with maximum demands at those facilities in close proximity to the central cities. This has led one commentator to observe:

> . . . [today's problems] do not center on the acquisition of unique and dramatic resources for the public, but on the broad availability of outdoor recreation for everyone and often; nearby open areas for weekend visits by moderate-income urbanites are more characteristic of our recreation needs than the trip to a far away area of unforgettable beauty by the fortunate persons who can get there.[15]

The importance of providing outdoor recreation facilities close to where people live is highlighted by the fact that, in the inner cities, one finds the lowest rates of participation associated with low-income

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[15] Perloff and Wingo, Trends in American Living and Outdoor Recreation, U.S. Outdoor Recreation Resources Review Commission Study Report No. 22, at 82 (Wash. D.C. 1962).

and poorly-educated people living in oppressive surroundings. Outdoor recreation does not play an important role in the leisure time of these groups due to the lack of nearby facilities and the lack of money and adequate transportation to get to more distant areas. But while outdoor opportunities are most urgently needed close to metropolitan areas, the scarcity of land and intense competition for private development often result in low per capita provision of public recreation facilities.[16]

The final major trend to be noted in the pervasive attraction for water-oriented activities, as described in the final report of the ORRRC:

> Most people seeking outdoor recreation want water to sit by, to swim and fish in, to ski across, to dive under and to run their boats over. Swimming is now one of the most popular outdoor activities and is likely to be the most popular of all by the turn of the century. Boating and fishing are among the top 10 activities. Camping, picnicking, and hiking, also high on the list, are more attractive near water sites.[17]

Of the outdoor activities listed in Table 1, water sports accounted for 14.6 per cent of the annual user days per person and 26 per cent of the summertime user days, while 44 per cent of outdoor recreation participants favored water-based activities over any others. Among water

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[16] For a general discussion of problems and approaches to the urban recreation issue, see National League of Cities, Recreation in the Nation's Cities, prepared for the U.S. Bureau of Outdoor Recreation (Wash. D.C. 1968).

[17] U.S. Dept. of the Interior, op. cit. note 10 supra, at 4.

sports, swimming is the most prominant. It has by far the largest participation rate; is more highly associated with other activities[18]; seems to have special importance to urban dwellers, whose participation rate is 49 per cent versus 38 per cent for the non-urban population; and is even preferred by 17 per cent of those not participating in outdoor recreation. This preference for swimming was confirmed by the 1965 Bureau of Outdoor Recreation survey, which reported that swimming had attained second place in user participation and was becoming so popular that it will be our number one outdoor recreation activity by 1980.[19] The survey found that, in 1965, 48 per cent of the population (12 years and over) swam an average of 14.3 days each; 30 per cent went fishing an average of 7.6 days; 24 per cent went boating an average of 6.5 times; and 6 per cent went water skiing an average of 6.6 times.[20] More recently, the preliminary results of a 1970 Bureau of Outdoor Recreation survey indicate that per capita participation in both swimming and boating activities has risen nearly 50 per cent from 1960 levels, from 6.47 to 9 days per person annually.[21]

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[18] See U.S. Outdoor Recreation Resources Review Commission, op. cit. note 14 supra, at 6.

[19] U.S. Bureau of Outdoor Recreation, op. cit. note 12 supra.

[20] Id., at 9-11.

[21] U.S. Bureau of Outdoor Recreation, The 1970 Survey of Outdoor Recreation Activities: Preliminary Report, at 9 (Wash. D.C. 1972).

From this outline of the proportions of future demands for outdoor recreation, we can draw some clear implications as to the future of shoreline recreation. With continuing increases in coastal population, leisure, income, and mobility, the demands for shoreline recreation will increase steadily. Swimming and boating are expected to grow at an annual rate of 3.5 to 3.8 per cent[22]; fishing at 1.8 per cent[23]; water-skiing at 6.1 per cent[24]; surfing at 3 per cent[25]; and skin diving at 5 per cent[26]. Such growth rates are staggering when we consider that the supply of public recreational facilities is essentially fixed, and most of these facilities are already filled to capacity. Consider, for example, this excerpt from a Massachusetts report on public outdoor recreation:

> . . . 80 per cent of the ocean beach capacity lies within the Metropolitan Parks District, where 2 million people, more than 40 per cent of the State's population,live. Within this district, where the beaches can accomodate 15 per cent of the resident population, use on peak days taxes their capacity heavily.[27]

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[22] U.S. Bureau of Outdoor Recreation, op. cit. note 12 supra, at 9.

[23] Id.

[24] Id.

[25] Merrill, Lynch, Pierce, Fenner and Smith, Leisure - Investment Opportunities in a $150 Billion Market, at 7 (1968).

[26] See Winslow & Bigler, "A New Perspective on Recreational Use of the Ocean" Undersea Technology, vol. 10, no. 7, at 52 (July, 1969).

[27] Commonwealth of Massachusetts, Division of Natural Resources, Public Outdoor Recreation (1954).

Interestingly enough, this was the situation in 1954. By 1970, this population had risen to approximately 2.8 million, or 48 per cent of the state total[28], without a correspondingly large increase in public beach facilities. Anyone who has been delayed for hours on a hot day in bumper-to-bumper traffic to the Cape Cod shore, or who has experienced the mobs of people at the Revere and Lynn beaches north of Boston, knows what I'm talking about. A similar situation exists with boating facilities in some areas, where there are so many boats at anchor that room for turn-arounds is fast disappearing. In Rhode Island, for example, over three hundred new pleasure boats are bought annually, each of which will require accommodations for mooring and servicing. These observations regarding the disproportionate situation between shoreline demand and supply will be further discussed in Chapter Three.

3. The Value of Shoreline Recreational Resources

The fact that hordes of recreationists crowd the beaches and other coastal recreational facilities, especially near the cities, points to the intrinsic value of the shoreline as a public resource. This social value has been noted by the ORRRC:

> Of the many outdoor recreation "environments" -- mountains, seacoasts, deserts, and woodlands -- the shoreline seems to have an unusually strong appeal for Americans.[29]

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[28] See U.S. Dept. of Commerce, Statistical Abstract of the United States - 1972 at 838 (Wash. D.C. 1972).

[29] George Washington University, Shoreline Recreation Resources of the United States, U.S. Outdoor Recreation Resources Review Commission Study Report No. 4, at 10 (Wash. D.C. 1962).

Why this propensity for water-related activity, especially at the coastal shores? Some possible explanations offered by one commentator are as follows:

> Perhaps it is an adaption of our frontier traditions to the conditions of modern life. It may be a reflection of a deep-seated desire for some activity in which the whole family can join. To some extent, it may be a flight from urban living, or even from the new suburbs, to a more direct contact with nature. Water-centered recreation is often associated with less congestion and regimentation. Perhaps the tactile sensations -- direct immersion in air, water, and sunshine with less screening from clothing -- explain its appeal to many.[30]

While such sociological and psychological considerations may be fairly debatable as causal factors, the wide variety of easy, active forms of recreational activity that the shoreline affords cannot be denied as a motivational force. This wide variety includes swimming, skindiving, beachcombing, motor boating, sailing, canoeing, waterskiing, and fishing. Many other activities, such as picnicking, camping, sunbathing, and walking are greatly enhanced by proximity to the ocean. Beach shoreline, in most cases, offers the cheapest and most enjoyable recreation uses for large numbers of people.

> Going into the surf is fun whether one swims or not. It is not necessary to be a mountain climber to take walks along the beach, and beachcombing is an activity that appeals to everyone from toddler to octogenerian . . . here, land, and water are easily accessible;

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[30] Moore, "The Rise of Reservoir Recreation," Economic Studies of Outdoor Recreation, ORRRC Study Report No. 24, at 24 (Wash. D.C. 1962); See also Ditton, The Social and Economic Significance of Recreation Activities in the Maine Environment, Univ. of Michigan Sea Grant Program, Technical Report No. 11 (1972).

> the violence of breaking surfs and the warm safety of relaxing sands are but a step apart; the stimulation of the foreign environment of the water and the relaxation of sunbathing are nowhere else so easy of choice. Physical sport and mental relaxation are equally available. [31]

An additional use of coastal areas, and probably the most widespread, is for aesthetic enjoyment, including nature watching, shell collection, or travel along bluff shoreline.

> Tourists from the interior states are always eager to view such sights as ships coming under the Golden Gate Bridge into San Francisco Bay, the lovely solitude of Fort Sumter as it rests seemingly impregnable in Charleston Harbor, and the parade of ships in and out of New York Harbor. Attractive scenic vistas are not for the tourists alone, but hold a certain magnetism for residents of the coastal cities as well. One has only to scan the real estate advertisements to realize the premium value on waterfront or waterview lots. [32]

All of the above values associated with shoreline resources are of course magnified by their physical accessibility to large populations, and can be measured to some extent in economic terms. Recreation is America's fourth largest and fastest growing industry, and economists estimate that the total leisure industry market could reach $250 billion by 1975.[33] Of this, total outdoor recreation expenditures are forecast

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[31] See George Washington University, op. cit. note 29 supra, at 4.

[32] U.S. Dept. of the Interior, Federal Water Pollution Control Administration, The National Estuarine Pollution Study, vol. II, part 4, at 116 (1969).

[33] Jensen, Outdoor Recreation in America , at 214 (Burgess Publ. Co. 1970).

to reach $83 billion,with the ocean recreation market accounting for $23.5 billion, or approximately 28 per cent.[34] The recreational boating market alone is expected to account for $4.5 billion of this business.[35]

4. Factors Constraining the Recreational Use of Shoreline Resources

While water-based recreation activity is projected to increase dramatically in the future, we must be cognizant of the fact that such predictions are based on participation rates which cannot be extrapolated independently of a number of limiting factors. These factors include: (1) the suitability of particular areas for recreational purposes; and (2) the availability of suitable areas to potential users.

The suitability of coastal areas for recreation depends both on the amount and type of shoreline involved and the quality of the water adjacent to it. There are three types of shoreline[36] -- beach, bluff, and wetland. Beaches can support the widest variety of recreational uses, but their suitability can be hampered by the destructive effects of erosion. This is especially true of situations where sand dunes, which act as natural barriers to wind, wave, and current forces, are

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[34] Winslow & Bigler, op. cit. note 26 supra, at 53.

[35] Merrill, Lynch, Pierce, Fenner and Smith, op. cit. note 25 supra, at 7.

[36] This discussion is based on the materials presented in George Washington University, op. cit. note 29 supra, at 10-12.

destroyed by widespread trampling of their supporting vegetation.[37] Bluff shores are characterized by banks or cliffs immediately landward of a narrow beach, and provide unique scenic vistas and rugged isolation in conjunction with the marine environment. As such, they are in demand by hikers, campers, sightseers, nature watchers, and other groups seeking passive outdoor pursuits. Bluff shores are not particularly vulnerable to the action of currents but are erodible under wave attack. Wetlands are characterized by tidal or non-tidal marsh. These shore areas are in lesser demand as public recreational areas, but are the most valuable type of shoreline in the ecological sense due to the wide range of marine biological organisms they support.[38] Wetlands are extremely susceptible to damage caused by pollution or dredging and filling for residential or commercial construction. Finally, water quality will influence the suitability of a given shoreline area (particularly beaches) for recreational purposes:

> The quality of water is as important as the amount of surface acres, miles of banks, or location. Polluted water in the ocean, a lake, a river, or a reservoir is of little use for recreation. Pollution by human or industrial waste is only one aspect of quality

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[37] See McHarg, Design with Nature, at 7 (Doubleday, 1969).

[38] See generally, Niering, The Life of the Marsh (McGraw-Hill, 1967)

> which conditions the available supply. The silt load, the bottom condition, temperature, and aquatic plants also affect the usability of water for recreation.[39]

The second major factor that serves to constrain public recreational use of the shoreline is the availability of suitable areas, in both the legal and the physical sense. Private ownership and municipal control of beach parking facilities for local residents only are forms of legal restrictions on public use of shore areas. In general, then, the only beaches widely available to the public are public beaches, and even some of these are restricted.[40] And where public beaches are few and far between, the physical dimension of availability comes into play. One aspect of this is the discouraging effect of crowding both on the beaches and on the highways which lead to them. The other aspect concerns accessibility as a function of each user's income and mobility. While certain middle-to-upper income groups can often afford either second homes or extended stays at distant vacation areas, the majority of people prefer recreation within about 90 miles of home, and low-income groups are generally confined to the immediate vicinity of the metropolitan areas, where suitable public facilities may be in short supply.

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[39] Dept. of the Interior, op. cit. note 10 supra, at 70; See also Ditton, Water Based Recreation: Access, Water Quality, and Incompatible Use Considerations - An Interdisciplinary Bibliography, Council of Planning Librarians, Exchange Bibliography No. 193, at 5 (1970).

[40] George Washington University, op. cit. note 29 supra, at 5.

5. Concluding Remarks

The demand for outdoor recreation, especially that which is water-oriented, is growing rapidly as the trends toward more leisure time, more real income, and greater mobility enable larger proportions of our growing population to seek recreation activity of all types. The American coastal shoreline, as a unique recreational resource, is ideally situated to accommodate a wide range of these activities; most planners agree that the "hidden demands" for recreational use of this resource are enormous, limited only by the effective supply. The question we must now ask is: To what extent has the public interest in the shoreline as a recreational asset been represented in the allocation of coastal lands among competing users? This is the topic for discussion in the remaining chapters of Part One.

CHAPTER THREE

The Supply of Shoreline Recreation Resources

1. Introduction

As a nation, we presently face a shortage of shoreline recreational opportunities for the public. The mushrooming demand for the unique recreational experience that the coastal environment provides has far outstripped the effective supply of suitable resources, particularly in urban areas where the needs are greatest. The situation has aptly been described by Bayard Webster, of the New York Times:

> The shoreline of the United States has been so built up, industrialized and polluted during the last decade that there are relatively few beaches left for the family in search of a free, solitary hour by the sea.
>
> From Maine to Florida and on around to Texas, from Southern California up to Washington State, the nation's seashores have become cluttered with hotels, motels, sprawling developments, military complexes and industries of every kind.
>
> Miles of tranquil beaches where hundreds of seaside retreats were once open to everyone for swimming or fishing have been fouled by oil spills, industrial effluents, farm pesticides and city sewage.
>
> What remains - shoreland that is not dirty, crowded or closed to the public - amounts to a tiny

> fraction of the country's total coastal zone, about 1,200 miles or 5 percent of the shore areas considered suitable for recreation or human habitation.
>
> The prospect of continuing encroachment, together with the intensified natural erosion often caused by heedless development (even in normal weather, winds and waves can eat away or shift up to 20 feet of beach a year), has alarmed many marine biologists and conservationists.
>
> Close to the heart of the problem are two factors . . . One is the sharp increase in recent years in the nation's population. The other is the rush to the large coastal cities by millions of people from inland rural areas.
>
> The result is that popular demand for open recreational space near the water is rising just as private and industrial developers are fencing off the best of it - if not the last of it in any given area - and land prices are spiraling far beyond the means of most urban dwellers.[1]

Mr. Webster has touched on all the pertinent issues relative to the supply of shoreline recreational resources, and we will examine more closely each of those issues in the present chapter.

A mileage summary of the detailed tidal shoreline and recreation shoreline of major coasts of the United States in 1960 is shown in Table 2. The 28 contiguous coastal states have nearly 60,000 miles of shoreline, of which about one-third (21,700) is considered suitable for

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[1] Webster, "Few Seaside Beaches Left Open in Developers' Rush," New York Times, March 29, 1970 at 54.

Shoreline Location	Detailed Tidal Shoreline (Statute Miles)	Recreation Shoreline (Statute Miles)	Public Recreation (Statute Miles)
Atlantic Ocean	28,377	9,961	336
Gulf of Mexico	17,437	4,319	121
Pacific Ocean	7,863	3,175	296
Great Lakes	5,480	4,269	456
TOTAL	59,157	21,724	1,209

Source: ORRRC Study Report No. 4, Shoreline Recreation Resources of the United States, at 11, (1962).

Table 2: Mileage of Tidal and Recreational Shoreline of the United States (1960)

recreation according to U.S. Coast and Geodetic survey criteria.[2] Of this recreational shoreline, there are 4,350 miles of beach, 11,160 miles of

[2]These criteria include: (1) the existence of a marine climate and environment; (2) the existence of an expanse of view at least five miles over water to the horizon from somewhere on the shore; (3) location on some water boundary of the United States.

bluff, and 6,214 miles of marshland.[3] With respect to ownership in 1960, the figures presented in the table indicate that less than two per cent of the total shoreline were in public hands for recreation, while only about 5.5 per cent of the recreational shoreline was government owned. On the entire Atlantic Coast, only 336 miles of shoreline were publicly owned for recreation, a mere three per cent of the total recreational shoreline. Yet, this coast contains the population concentrations of the sprawling Northeast megalopolis and Florida. In the densely settled North Atlantic and Middle Atlantic regions, there are 5,912 miles of recreational shoreline, of which 5,654 miles were under private or restricted public control; hence, 97 per cent of the shore in 1960 was inaccessible to the general public.[4]

While government acquisition programs over the last ten years have increased the supply of beaches somewhat, the percentage of public ownership remains low. In the recently conducted National Shoreline Study[5], the U.S. Army Corps of Engineers found approximately 3,400 miles

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[3] George Washington University, Shoreline Recreation Resources of the United States, U.S. Outdoor Recreation Resources Review Committee Study Report No. 4, at 12 (Wash. D.C. 1962).

[4] Id. A beach is defined as "a wide expanse of sand or other beach material lying at the waterline and of sufficient extent to permit its development as a recreation facility without important encroachment on the upland." Bluffs vary in height from a minimum of several feet to mountainous elevation.

[5] Dept. of the Army, Corps of Engineers, Report on the National Shoreline Study, at 31 (Wash. D.C. 1971).

of shoreline in public recreational use. Since the criteria used in defining shoreline type and usage differed from that employed in the 1962 ORRRC report[6], percentage comparisons are impossible, though it seems likely that there have been substantial increases in public use in some regions. However, these increases are insignificant when placed in the proper perspective. We can calculate the total carrying capacity of a beach as follows[7]: assuming an average beach width above water of 50 feet, and allocating 100 square feet of space per person, each mile of beach could accommodate 2,640 persons,and the 4,350 miles of beach in the U.S. could accommodate 11.5 million people. If 10 per cent of the population uses the beach at any given time, then the total beach shoreline of the U.S. could just about handle the demands of the coastal population of 108 million. But the total beach shoreline is not available; since public use is limited to a small percentage, much of the potential demand must go unmet.

[6] In the Army Corps report, shoreline mileage refers only to those littoral areas exposed to erosion by waves and currents. Total U.S. shoreline (excluding Alaska and Hawaii) by this measure is 36,940 miles, versus 59,157 miles of tidal shore as cited in the ORRRC report. A similar discrepancy exists with respect to beaches, with the Army Corps citing 11,970 miles and the ORRRC 4,350 miles. It seems likely that much of what the Geodetic Survey calls bluff is included in what the Army Corps calls beach.

[7] These assumptions are derived from the calculations in George Washington University, op. cit. note 3 supra, at 13. For an extremely detailed economic analysis of resource carrying-capacity, see Fisher and Krutilla, "Determination of Optimal Capacity of Resource-Based Recreation Facilities," 12 Natural Resources J. 417 (1972).

2. Suitability

The problem of limited shoreline availability for public use is complicated by the problems of pollution and erosion. Pollution has destroyed countless fish and shellfish areas and fouled beaches in and around every major coastal city. In Boston Harbor, many islands would offer excellent opportunities for a variety of water-related activities were it not for the poor water quality, due in part to high bacteria counts resulting from municipal sewage dumping and storm sewer overflow. Oil spills, pesticides, and industrial effluents have also taken their toll of valuable shoreline resources. The case of the death of Lake Erie is probably the most celebrated example of this serious problem. In some cities, high pollution levels force the closing of beaches during the peak summer periods. Yet, the pressures on shoreline facilities near metropolitan areas are so great that frequently the waters, even in busy harbors, are still used for recreational purposes by those who cannot afford to go elsewhere, regardless of whether they are safe for body contact or not. This again points to the problem of the inability of low income, less mobile groups to find suitable coastal recreational facilities anywhere but in the immediate vicinity of urban centers, where the pollution problems are most severe, and where fewer beaches are available and oftentimes inaccessible due to gross overcrowding.

The second element contributing to the decreasing supply of suitable coastal land is shore erosion, which is often accelerated by

improper land use that stems from a lack of knowledge of the dynamics of beach areas. A recent article entitled "America's Shoreline is Shrinking" points out the seriousness of this problem:

> From Cape Cod to California, America's ocean shoreline is being cut and furrowed by erosion. Much of this is the result of the ceaseless action of waves and wind, a combination of forces as old as the sea itself . . . (an example is) the dramatic case of Cape May, New Jersey, a famous resort area which has lost a fourth of its land area to the combined action of wind and wave during the last 30 years or so.
>
> The State of Maryland loses about 300 acres of valuable land every year along the shores of Chesapeake Bay . . . Sections of shoreline at Point Hueneme, California. . . have receded as much as 700 feet in ten years.[8]

In its National Shoreline Study in 1971, the Army Corps of Engineers found that 25 per cent of the total U.S. shoreline exposed to wave and current action was undergoing significant erosion.[9] Frequently, these natural forces are greatly abetted by man. Ian McHarg, in his book, Design with Nature, has pointed out the dangers that trampling dunegrasses, lowering the level of groundwater, and interrupting littoral sand drift pose to the stability of dune formations. He has this to say about such formations in New Jersey:

> The knowledge that the New Jersey Shore is not a certain land mass as is the Piedmont or Coastal Plain is of some importance. It is continually involved in a contest with the sea; its shape is

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[8] Bunker, "America's Shoreline is Shrinking," Boston Herald Traveler, October 18, 1970, at 23.

[9] See Army Corps of Engineers, note 5 supra, at 18.

> dynamic. Its relative stability is dependent upon the anchoring vegetation . . . If you would have the dunes protect you, and the dunes are stabilized by grasses, and these cannot tolerate man, then survival and the public interest is well served by protecting the grasses. But in New Jersey they are totally unprotected. Indeed, nowhere along our entire eastern seaboard are they even recognized as valuable . . . Sadly, in New Jersey no . . . planning principles have been developed. While all the principles are familiar to botanists and ecologists, this has no effect whatsoever upon the form of development. Houses are built upon dunes, grasses destroyed, dunes breached for beach access and housing; groundwater is withdrawn with little control, areas are paved, bayshore is filled and urbanized. Ignorance is compounded with anarchy and greed to make the raddled face of the Jersey Shore.[10]

3. A Case Example

The critical magnitude of the supply situation with regard to shoreline resources can best be demonstrated by considering what has been happening in the State of Maine in recent years. Maine's varied and beautiful shoreline is its greatest asset; the coastal zone includes ten per cent of the total geographical area, 36 per cent of the population, and 127 local governmental units. Forty per cent of the wages in Maine are generated in this zone, while sixty per cent of all recreational property and seasonal residences are located there. Almost the entire coast is steep, rocky bluff with occasional small beaches of gravel or mud. In many areas, deep water occurs close up to the shore. The coast is

[10] McHarg, Design with Nature, Natural History Press, Garden City, N.Y. (1969).

very irregular with numerous coves, inlets, small bays, and similar areas serving as harbors or sheltered areas. The shore area is only slightly developed with only 34 miles (or 1.4 per cent of the coastline) in public ownership for recreation; the primary uses over the remaining 2,578 miles are private with some commercial resort activity. The shoreline is least suitable for swimming and water sports since there are only 23 miles of beach along the entire coast. The most suitable activities are camping, hiking, boating, sailing, and sightseeing, for which the 2,520 miles of ragged, rocky bluff shore provide an ideal setting. However, these activities are severely restricted in many places due to extensive private ownership of prime coastal property.

While pollution has caused serious problems with the taking of shell fish, by far the most serious question facing Maine with regard to its shoreline resources is the large percentage of private ownership. In 1967, a land use symposium organized at Bowdoin College by land consultant John McKee pinpointed the issues relating to this question and outlined the successes and failures of Maine's governmental bodies in dealing with it. McKee and his colleagues emphasized the public's right of access to unique shoreline, not only to a "mudflat or a rundown beach, but to a cliff and forest and cove - precisely the places that are selling fastest today . . . Unless Maine decides right now to control the promise of development, Maine's greatest asset will have been squandered, irresponsibly, and definitely."[11] Such warnings have been given repeatedly

[11] Cummings, "The Late Great State of Maine," Portland Sunday Telegram, August 30, 1970.

over the last decade by professional planners, newspaper writers, conservationists, and others concerned with the rapid disappearance of Maine's precious coastal resources into private control. The most recent of these was a series of articles by Robert C. Cummings in the Portland Sunday Telegram, which outlined the results of a survey of real estate agents, developers, town and city officials, and county courthouse records:

> Maine has probably lost its chance for significant public control over its 3,000 miles of coastline. Indeed, before the end of this decade, it appears certain that people will have to begin lining up before dawn on most good summer weekends if they want a spot at a public beach.
>
> This conclusion seems inescapable. Some waterfront state parks are already turning away visitors by noon or earlier, overall park usage is increasing at the rate of 20 percent a year and State Parks and Recreation Director Lawrence Stuart says flatly that desirable coastal property has practically disappeared.
>
> Campers frequently have to wait in line all night for a campsite to become available at Acadia National Park. Persons who just want to go to the beach for an afternoon will soon face "sorry we are filled up" problems.
>
> Dalton Kirk, supervisor of the park district that ranges from Eagle Island off Harpswell to Pemaquid, notes that admissions to Reid State Park at Georgetown are up 20 percent, despite the opening of a new park across the Kennebec River at Popham Beach.
>
> Kirk says that already in his region the state parks provide the only opportunity for most people to get to the beach. But Reid State Park twice this season has been forced

> to turn away beachgoers when the nearly 900 parking spaces were filled to capacity.
>
> And at Popham, cars are turned away almost every good Sunday afternoon by 1 o'clock . . .
>
> The state has purchased another 25 acres of mostly beach front this summer at Popham, and Kirk believes the facilities there can be doubled eventually. But this adds only 25 percent to the region's park capacity and the number of visitors is growing at twice this rate. Kirk sees no possibilities of further expanding Reid State Park without destroying the naturalness of the area.
>
> "We need to get any beach frontage that is left in Maine," Kirk says. But if and when the State decides to buy, it may find little property for sale.[12]

While pessimistic about the future status of the coast for public use, the series stresses the importance of recognizing the critical nature of the problem in order to avoid the same mistakes with inland lake and mountain areas, already under heavy pressures of speculation and development.

> While Maine debates the pros and cons of oil refineries, sulfur reduction plants and aluminum processing, a quiet revolution in land ownership continues which promises to bar all but the most affluent from our 3,000 miles of ocean frontage.
>
> . . . development has already progressed to the point where, regardless of what the state does, there is unlikely to be enough suitable ocean frontage to serve Maine and its ever-

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[12] Id. See also, Cummings, "Where Went the Maine Coast," Aug. 16, 1970 and "Maine For Sale: Everybody's Buying," Aug. 23, 1970. Portland Sunday Telegram.

increasing hordes of summer visitors.

> Our survey reveals that Maine's coast has been sold, and that the buyers are largely from out of state. Big blocks remain in the hands of speculators and developers, and while plans are being made, Maine citizens are wandering at will as before, fishing the rocks, harvesting the crops of wild berries and enjoying secret picnic spots.
>
> But the pattern has been set. Wildland that in some cases was sold for unpaid taxes as recently as a decade and a half ago is about to become sites for luxury vacation and retirement homes with shore frontage selling for up to $100 a foot - or $20,000 for a 200 foot lot.[13]

Much of the Maine coast is in out-of-state ownership, which averages 45 per cent in the area but reaches 75 per cent in many communities. Many real estate brokers reported that 80 per cent or more of their business had been with out-of-staters. This boom is related to all the factors previously mentioned: increasing populations, growing prosperity, and better transportation such as the Maine turnpike and highway system that makes half the state's coastline no more than a three-hour trip from Boston. These factors, combined with the desire to get away from the metropolitan atmosphere, have led to the unprecedented demands currently placed on Maine's coastal real estate. As a consequence, "Maine residents, the greatest number of whom find the stakes too rich for their income, have found themselves shut off from the sea and the wilderness by out-of-state buyers who put up a sign before they put up a house."[14]

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[13] Id.

[14] Sherlock, "The Best of Maine Lost to the Rest of Maine," Boston Sunday Globe, Sept. 20, 1970.

4. Concluding Remarks

The purpose of this section has been to provide a general picture of the national supply of recreational shoreline. While a detailed inventory was not included, it is possible to draw some general conclusions by looking at the overall situation.

The first statement we can make is that the shoreline of the United States has, in general, been relegated to private interests. Shore property is highly desirable for private recreational use and as long as it is available there will be people to buy it, regardless of the cost. This seemingly boundless demand for a spot by the sea has sent land values skyrocketing: the price per front-foot of prime oceanfront property is often in the $100-150 range; the cost of an acre on the waterfront will often exceed $50,000; and even some relatively wild areas such as found in parts of North Carolina or Maine are presently in the hands of speculators and developers[15], who are assured of a fantastic profit in the not-too-distant future. Equally significant pressures for development of the shoreline come from industrial and commercial enterprises. Economic growth in the coastal areas has proceeded so rapidly

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[15] In a 1955 shoreline survey, the National Park Service found that "almost every attractive seashore area from Maine to Mexico that is accessible by road has been developed, has been acquired for development purposes, or is being considered for its development possibilities." U.S. Dept. of the Interior, Our Vanishing Shoreline, at 27 (Wash. D.C. 1955). Most of the inaccessible beach sites of 1955 are now the subdivided shorefront communities of 1973.

that over 40 per cent of all manufacturing plants in the U.S. are located within the borders of coastal countries. The Army Corps has reported recently that the same percentage (16%) of the shoreline surveyed is devoted to private non-recreational development as to private recreational development.[16] Some of these activities have a demonstrated need for accessibility to water, either for transportation or as an input to production. For example, tanker-oriented oil companies and chemical manufacturers require multi-fathom harbors, while paper mills, primary metal plants, and power stations require substantial water supplies in the course of normal operations. But there are also many industrial and commercial activities taking place on the waterfront -- especially in urban areas -- for which proximity to water is not an essential operational ingredient. The end result of all this private development is almost invariably exclusion of the public. Many nonrecreation uses deny recreational uses absolutely, since "the practical and aesthetic requirements of clean water, adequate land area, safety and pleasant surroundings, and necessary recreation developments can rarely be assured in conjunction with commerce, industry, housing, and transportation."[17] In addition, the practice followed by many shore owners for years of permitting public access and use of beach and bluff areas is rapidly declining. As the numbers

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[16] U.S. Army Corps of Engineers, op. cit. note 5 supra, at 31.

[17] See George Washington University, note 3 supra, at 7.

seeking recreational pursuits in these areas increase each year, many states are finding that their private owners are now limiting such activity to maintain their own privacy. Hence, as the demands increase, this one part of the accessible supply is actually decreasing. Again, the situation in Maine is typical:

> The mountains are still there, the Atlantic Ocean still crashes its surf onto the rocks as it has done since the Ice Age and there is still some wilderness. It's just a little farther away now - on the other side of the fence.[18]

A second major point to be noted is the present saturation of most publicly owned facilities. On the Connecticut shore, where the recreation facilities are under strong demand pressures from the dense New York-Connecticut metropolitan area, local communities find it necessary to institute user fees, parking charges, and other discriminatory devices to preserve for the local residents what small amounts of shore are left open to the public. The situation is much the same near other population centers in New England. Beaches on Narraganset Bay, Cape Cod, and in the Boston Metropolitan region are jammed almost every weekend in the summer, while the beaches farther north become more crowded each year as New Englanders search for new, less crowded, accessible recreational areas. This trend is evidenced by the marked increase in traffic patterns these past few summers leading from Boston to the Southern parts of New

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[18] See Sherlock, note 14 *supra*.

Hampshire and Maine.

The third and final major issue in shoreline supply is the influence of pollution and erosion, often caused by heedless development in ecologically delicate areas. Pollution, usually most severe where people are concentrated in large numbers, has closed many city beaches and threatens numerous others. Erosion too has closed or destroyed beaches and presents a continuous threat, especially in places like Miami Beach, Florida, where some hotels are built almost right in the surf, or in Ocean City, Maryland, where houses are built as close as six feet apart for many miles along the shore.

So this is the overall picture of shoreline supply: most of the land is privately owned and developed and is becoming more restricted to public access as the demands grow larger; and what is left in public lands for recreation is either saturated by hordes of users or unavailable for use due to pollution or erosion, especially near large cities. All this is to say nothing of the future. While the demands grow at a breakneck pace, the supply, limited to begin with, is shrinking steadily. How can we expect to satisfy the demands of the future when we are having trouble supplying that which is needed today? This critical shortage of shoreline recreational resources points to an immediate, urgent need to protect all the shoreline resources still available, and to look for ways to reverse the trends of decreasing supply. Since the best way to begin this task is to examine how the situation came about in the first place,

we will focus attention in the following chapters on the institutional arrangements surrounding the allocation of shoreline resources.

CHAPTER FOUR

Institutional Factors I: The Organization of Economic Activity

1. Introduction

The problem of shoreline recreation is one of a number of issues of national concern regarding the use of unique coastal resources. We are concerned because historical processes have apparently been under-representing certain important social values while over-representing others. Public beaches have not been sufficiently provided while private development has mushroomed; water quality has not been maintained as industrial and municipal wastes have made sewers out of many estuaries; and certain ecologically-important wetlands have not been protected from indiscriminate dredging and filling for residential or commercial use. The purpose of this and the following chapter is to provide a conceptual framework within which problems of this sort can be defined, their causes identified, and alternative proposals for solution evaluated. The framework essentially will comprise an analysis of the institutional mechanisms, both economic and political, which govern the allocation of any scarce resource among competing uses[1], with specific attention to

[1] While the system that allocates resources in this country is primarily economic and political, the law cannot be ignored as a forceful influence on the organization of allocative activity. (Footnote continued on next page)

the shoreline recreation question.

2. Efficiency and Equity as the Goals of Resource Allocation

Saying that resources have somehow been misallocated implies that there exists some optional allocation of resources that is consistent with the overall values of society. While this "social optimum" is impossible to determine in practice, it is quite useful to deal with in principle when trying to develop an understanding of the allocative system. And integral to the notion of optimality are the concepts of efficiency and social balance, which must be given clear and well-defined meanings.

Efficiency and social balance are important concepts because there is only a limited amount of resources available to our society. Limited resources include labor, technology, and natural resources, all of which are allocated to the production of a wide variety of economic "products", which are nothing more than whatever society finds desirable (physically, psychologically, aesthetically, or otherwise). Public beaches can be thought of as "products" in this sense, along with automobiles, television sets, health care, and other familiar goods and

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(Footnote 1 continued from previous page)

The legal dimension and its relationship to the discussion in the present chapter will be developed fully in Part Two of this report, at p. 79 et seq.

services. Since resources are limited, the total of all products that can be produced is also limited. And since there is a ceiling on the amount of products that might be available, the amount of each product that society gets depends on how much of all the others it desires. So, in other words, there are many combinations of products that society might have, but the total level of production is limited by the supply of resources. When we succeed in achieving the total production possible given the resources at our disposal, we are being efficient; and when this production is distributed among goods and services in accordance with aggregated social values and prevailing notions of equity and fairness, then we are also being socially-balanced.[2] These concepts are illustrated in Figure 1, which depicts what is known as a production-possibility curve for a hypothetical economy in which only two products using coastal land resources are available to society -- electric power and outdoor recreation. The curve represents the maximum level of production possible given the limitations of the resource base, and each point on the curve represents a different ratio of production for the two products. If no coastal land is devoted to recreation, we can have

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[2]It is the notion of social balance which tends to make the analysis of optimality vague and imprecise. While is may be possible to make good approximations as to the efficiency of production, "values" are often difficult to aggregate and "fairness" is a matter of subjective judgment.

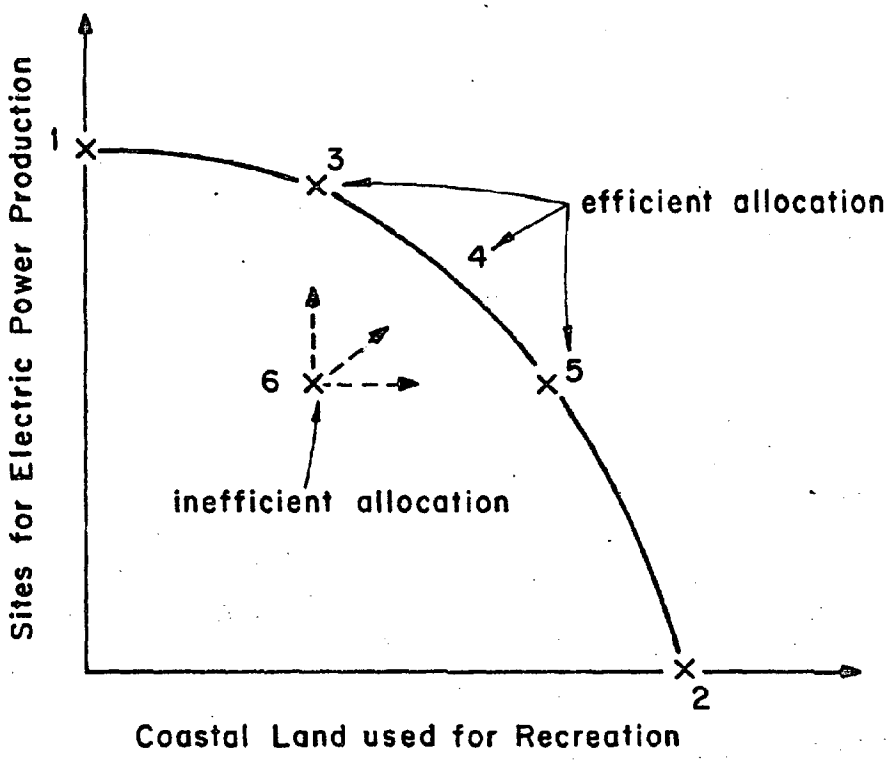

Figure 1: The Production-Possibility Curve for a Two-Product Economy Based on Shoreline Use

a lot of power plants (Point 1); if no power is generated, the entire shoreline can be used for recreation; and between these two extremes, there exist many production combinations (Points 3,4,5, etc.) of the two products. If society is efficient in its use of resources, the total output of the two-product economy will lie somewhere on the production-possibility curve; and if the resource allocation is socially-balanced, the relative amounts of each product provided by the economy will correspond to the relative value society attaches to them. So, if resource

allocation is to be optimal, the economic system must operate on the production-possibility curve, and at a particular point on the curve.

Two observations may help to clarify this analysis. First, note the distinction between efficient and inefficient allocations. When efficiency is attained (i.e., total output is on the curve), having more of one product requires that less be had of the other. If society wanted to move from Point 5 to Point 4, the gain in sites for power plants could only come at the expense of recreation areas, since all resources are being used to capacity. An inefficient resource allocation, on the other hand, lies inside the production-possibility curve, and this implies that we could have more of one product without reducing the amount we can have of the other one. Point 6 represents inefficiency since a more judicious application of resources could move society toward any point between Point 3 and Point 5, i.e., we could have more power sites or recreation areas or both without giving up any of either. If we assume that society always prefers more of a given product to less, then the movement from inefficient to efficient points makes us better off! The second observation of importance is that, while all the points on the curve represent efficient resource use (since total output is achieved), only one is optimal since society attaches priorities to each point depending on the relative amounts of each product it desires to have. At Point 3, there will be more power plants and fewer recreation areas than at Points 4 or 5. The optimal point represents that combination of products that would be produced if social value structures were perfectly articulated and weighed. But if for some reason certain social values are misrepresented, it is possible for

resources to be allocated efficiently yet result in a distribution of products that is not reflective of social needs and values. For example, the economy may provide the efficient production combination of Point 4, even though society may value having the additional recreation areas and fewer power plants of Point 5. Efficiency without social balance is sub-optimal.

A more realistic production-possibility curve would actually be a multi-dimensional surface, a complex representation of the possible combinations of all available products. Within this context, we can think of public recreational uses of the coastal shoreline as desirable products to which coastal land and water can be allocated, along with other products (energy, waste disposal, private housing, industrial goods, etc.) that represent other aspects of social well-being (e.g. jobs, health, etc.). However, the conceptual goals of efficiency and social balance remain unchanged. Public policy must be directed toward achieving optimality, i.e. efficiency in production together with the most desirable balance between the different dimensions of well-being. But what are the instruments of public policy? What are the institutional arrangements that society relies upon to organize its activities and direct them towards optimality? In the United States, we rely on two interdependent decision-systems: a free-enterprise, competitive market economy; and a representative democracy form of government. Historically, we have exhibited a strong cultural preference for market mechanisms in the allocation of resources, with governmental action to correct for market imperfections. Since our

discussions in Chapters Two and Three lead us to believe that these allocative processes have misallocated shoreline recreational resources, we must now discuss why this has happened.

3. The Private Market

In every situation where finite resources are utilized to satisfy needs that are almost infinite, there must be a means of setting priorities. The private market is the primary mechanism through which we exercise the choice among the combinations of products that might be provided, thus determining the allocation of resources.

In a perfectly competitive market, aggregated personal values are translated into desired amounts of production through the workings of the price-profit system. The price mechanism brings about effective proportional representation of individual values through the "vote" of the dollar. The profit mechanism brings about maximum efficiency through the flexibility of decentralized decision-making. If certain basic conditions are met, there will exist a set of market prices such that the activities of profit-maximizing firms and benefit-maximizing consumers who respond to those prices will automatically direct the economic system into an efficient allocative position.[3] This is a powerful result. If the market

[3] For a more extensive discussion, see Arrow, "The Organization of Economic Activity: Issues Pertinent to the Choice of Market vs. Non-market Allocation," The Analysis and Evaluation of Public Expenditures: The PPB System, Vol. 1, at 47 (U.S. Gov't. Printing Office, Wash. D.C. 1969).

can co-ordinate itself through a complex series of mutual adjustment processes, without the necessity of outside intervention, then efficiency is assured. This has led many economists to advocate reliance on market processes to the greatest extent possible; indeed, a good deal of government activity is designed to maintain the conditions necessary for markets to perform efficiently (i.e. control of monopolies). Yet even the most loyal defenders of the competitive market system admit that there <u>are</u> circumstances in which assumptions and conditions are violated such that markets fail to provide certain worthwhile outputs and underproduce others.

Aside from assumptions with regard to the nature of business behavior and the "perfectness" of competition, there are two criteria governing the efficacy of market performance:

1) All desired products must be priced, and social values must be capable of articulation through willingness-to-pay a price. This price must reflect the total social cost of lost opportunity, i.e. the value for other uses that is given up when resources are applied to the production of any particular product. For the economic system to move towards optimality with every transaction, the social benefits of devoting resources to the production of the product in question must exceed the costs.

2) Information must be available at low cost to both producers and consumers. Producers need knowledge of available technologies, demand, and the costs of factor inputs. Consumers need to know what goods are available and what their characteristics are. Both need to know the relevant set of prices. In some instances, information might be scarce, costly to collect, unreliable, or hard to understand and evaluate without special training.

Markets fail when the above criteria are not satisfied, and this happens under certain circumstances. For example, the transaction costs of organizing a fully-informed market may be excessive. Costs are always attached to the collection and dissemination of information regarding the terms surrounding transactions; and when these costs are too high, the existence of the market is no longer worthwhile.[4] Markets also fail when the characteristics of certain goods and services make them inherently unsuitable for provision by a private enterprise system. The classic examples of this situation occur in relation to the use of common-property resources such as air. For people whose primary use of the air is for breathing, clean air is a desirable product. For others, such as the operators of a steel mill, the air is also useful as a receptacle for gaseous wastes. However, its use for this purpose has side effects on the breathers of air, and these effects give rise to external costs. In order for a market to assign priorities to the conflicting uses, it must be possible to attach a price to the use of each unit of air based on the magnitude of these costs. But this is infeasible. First of all, pricing demands the exclusion of non-buyers from the use of the product; but consumption of air by one person does not diminish or preclude its availability to others. Secondly, prices must reflect total social costs;

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[4] Id. at 60.

yet how does one determine the amount of damage done to a large and diffuse population over a long period of time? Even if individuals could be excluded from use or damages measured, the transaction costs of doing these things would be enormous. Therefore, when prices do not exist for products such as air, markets will tend to overcommit resources to the production of other products, thereby foreclosing the opportunity to allocate some of those resources to more valued (but misrepresented) uses. Products that are subject to market failure are sometimes referred to as "public goods", and their provision necessarily entails some form of collective (governmental) action since the economic system, left alone, will tend to produce too many private goods and not enough public ones.

Before proceeding, one other aspect of private market operations should be noted. Even when the criteria for effective market performance are satisfied and efficient resource allocations are induced, this efficiency may not be socially optimal. This is because the outcomes of market transactions reflect the distribution of income in society. Goods and services are provided by the market in conformance with relative social desires, but only insofar as the participants are <u>able</u> to pay. But ability to pay frequently does not correspond to the value society places on having certain products. Therefore, even though the market can bring about efficiency, it makes no claim for achievements regarding social balance. This, too, may give rise to the need for collective action.

The provision of public goods through collective action raises many

issues well beyond the scope of this paper.[5] Suffice it to say that the political processes of government have imperfections of their own which stand as obstacles to the achievement of optimality in the allocation of resources. At this point, it is appropriate to turn to an analysis of the allocative system as it relates to shoreline recreational resources, while the shortcomings of certain forms of governmental action will become abundantly clear in Chapter Five.

4. Market Allocation of Shoreline Recreational Resources

The private market is ill-suited for the allocation of recreational resources for public use; it fails in two respects. First, public recreation as a product does not lend itself to the necessity of pricing. Consider, for example, the difficulty in trying to determine the value of a scenic bluff or a sand beach to the regional public. Conceivably, a developer could provide coastal roadways with scenic vistas, or beaches with parking facilities and bath houses, and charge user fees; but the

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[5] For detailed discussions of the role of government in relation to the economic system, see the collection of articles by leading economists in The Analysis and Evaluation of Public Expenditures: The PPB System, especially "Part I: The Appropriate Functions of Government in an Enterprise System," at 13 et seq. (U.S. Gov't. Printing Office, Wash. D.C. 1969).

uncertainty in setting a fee based on the willingness-to-pay of a diverse public and the possibility of little or no short-term return on a large investment make this highly unlikely. Even if the public could be polled to determine their preferences for beach recreation, the transaction costs of gathering such information could be prohibitive. Also, there is no guarantee that the information would be accurate, since people tend to misstate their preferences for economic goods depending upon whether or not they think they will be provided anyway. Thus, the need for elaborate and perhaps impossible studies to determine demand functions without the benefit of observing a market provides a seemingly insurmountable obstacle to the provision of beaches or other facilities through private initiative.

A second reason for market failure is that the shoreline shares in the common-property characteristics of the land-sea zone, i.e. the aesthetics, unique climate and physical makeup, wealth of biological life, etc. As one commentator has noted:

> . . . The land component of lake/bay resources perhaps possess no more common-property traits than does any land that can be plotted and deeded. However, when resource attributes of lakes and bays are considered, either singly or collectively, as the environment, the pervasiveness of common-property characteristics will constrain the process of converting those resources into public goods and services.[6]

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[6] Craine, "Institutions for Managing Lakes and Bays," 11 Natural Resources Journal 519, at 524 (1971).

What this means is that, in the absence of any effective articulation of their value for public uses, resources such as the coastal shoreline will be overcommitted to those uses for which there does exist some mode of value-expression (i.e. a market price). These uses frequently entail highly capital-intensive development, such as industry, housing, commerce, and private recreation (beach clubs, private marinas, etc.). For example, the development of the shore as vacation home sites provides an immediate and well-defined return on investment. The same is true for other forms of private commercial or industrial development on the shore, since markets exist whereby the value of the resource to these enterprises can be articulated. Public recreation, on the other hand, ranks low on the capital-intensive scale; its value to the public is diffuse, costly to collect, and possibly unquantifiable.

While market failure presents a compelling rationale for government intervention in the shoreline allocation process, there is an additional source of justification. It is possible that even a properly-functioning market would, as Craine has put it, "progressively limit to the higher income classes the benefits arising from shoreline access."[7] This conflicts with the expanding notion of recreation as an inalienable right, and of recreational resources -- especially unique environmental ones -- as

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[7] Id. at 520.

something all people should have equal opportunities to enjoy regardless of income or place in life. Typical of such sentiments were these words of Laurence Frank, in his report to the ORRRC on trends in American living:

> A new slogan, declaring that recreation is the fifth freedom that we now urgently need to gain and enjoy the other four freedoms, might elicit a nation-wide response and a reaffirmation of our traditional goals and historic aspirations.
>
> Seen as an indispensable, vitally imperative need in the great movement for human conservation, we can say that opportunity for outdoor recreation today is also an undeniable human right in a democracy . . . no one should be deprived of outdoor recreation through which individuals can make human living more significant and fulfilling, more conducive to the realization of their human potentialities and attainment of our enduring goal values.[8]

We can easily conclude from these observations that shoreline recreation for the public has every right to be considered a "public good", since an unfettered market would allow the bids for private development to far outstrip those for public use. This in fact is exactly what has led to the supply situation described in the previous chapter. The question that presents itself now is: Why has governmental action failed to represent the interests of the public in the shoreline?

This we shall deal with in the following chapter.

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[8] Frank, et al., Trends in American Living and Outdoor Recreation, Outdoor Recreation Resources Review Commission (ORRRC) Study Report No. 22, at 231 (Wash. D.C. 1962).

CHAPTER FIVE
Institutional Factors II: The Organization of Political Activity

1. Introduction

While private market mechanisms are relied upon as the essential ingredient of the allocative system, they operate within the broad legal and political constraints established by government. In this chapter, we will examine how the organization of political activity affects the allocation of recreational resources in the coastal shoreline. This organization consists of a large and diverse group of governmental units at federal, state, and local levels, who exercise some form of jurisdiction or control over varying amounts of coastal property. Theoretically, these governmental units are in the position to effect policies that could move the overall allocative process towards a socially-optimal use of the shoreline. But we shall see that political controls, for a number of reasons, also have the potential to perpetuate inefficient resource utilization.

One problem common to all levels of government is a financial one. Historically, governments have sought to acquire public recreation

resources through purchase or condemnation.[1] With land prices going up between 5 and 10 per cent annually, and with lands suitable for public recreational use appreciating at a considerably higher rate[2], the costs of wholesale resource acquisition are often well beyond the reach of many state and local economies. Furthermore, the costs of acquisition are only one part of the overall fiscal picture. Beaches, for example, must be maintained and policed, with transportation facilities provided for access; an increased influx of recreationalists might cause congestion and create additional demands for municipal services; and the property tax base itself would be reduced by taking prime waterfront property off the tax rolls. All of these could be financially burdensome to state and local governments, especially in light of pressing needs for housing, education, institutions, health care, and the whole range of public services. As a result, recreational needs often occupy positions of low priority on state and municipal budgets, even to the extent that funds necessary to match federal appropriations[3] may not be available.

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[1] See Chapter 8 infra, at p. 122 .

[2] See generally, U.S. Bureau of Outdoor Recreation, A Report on Recreation Land Price Escalation, (Wash. D.C. 1967).

[3] See Chapter 8 infra, at p.123

While fiscal difficulties are often important factors that serve to inhibit effective collective action, they are not so significant as the other common nemesis of all government activity, i.e., "the stifling effect of jurisdictional boundaries which, by a curious osmosis, permits the diffusion of problems throughout the region, while blocking any corresponding flow of governmental responsibility."[4] This points to the natural consequences of fragmented political control over a resource such as the shoreline, which is obviously no respecter of jurisdictional boundaries. Prime recreation areas are irregularly distributed throughout most regions, and ever-increasing leisure time and mobility bring increasing numbers of recreationalists to any richly-endowed location within an expanding radius of urban centers. So while the problems transcend local and even state borders, the responsibility to deal with them has not been fixed due to the absence of any logical place in the conventional government structure. Almost by default, then, the local communities have been left to control in an unco-ordinated fashion the allocation of resources that are of regional importance. And as one might expect, there are orderly forces at work which cause local decision-makers to act irresponsibly with respect to the regional interest.

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[4] Perloff and Wingo, et. al., Trends in American Living and Outdoor Recreation, U.S. Outdoor Recreation Resources Review Commission Study Report No. 22, at 84 (Wash. D.C. 1962).

2. Decision-Making at the Local Level

Through the powers of zoning, subdivision control, acquisition, eminent domain and the like, municipal governments are in the best position to encourage uses of the shoreline most consistent with the general welfare. But the particular economic and political context within which local governmental units make decisions about shoreline use can lead to inefficient allocation on a broad scale.[5] We have already seen how the uneven distribution of prime recreational shoreline property places heavy demand pressures from the region on specific communities, making their coastal property more valuable than some neighboring towns not similarly "blessed" with good beaches or whatever. Yet, in the absence of any mechanisms to articulate this regional vlue, the municipality is free to use its powers[6] on behalf of purely local objectives. This can best be illustrated by looking at the decision-making process involving some coastal zone project, perhaps a power plant project. Let us first distinguish between two types of effects that might be associated with such a project -- direct and indirect. Direct effects are those that accrue to the consumers or users of the project; the user of the power supplied, the former bathers on a closed beach, the swallowers of polluted air, the viewers of marsh wildlife, etc. All of these effects are felt by the local community and by the regional society in general. Yet only

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[5] See generally, Devanney, et al., Economic Factors in the Development of a Coastal Zone, MIT Sea Grant Project Office, Report No. 71-1 (November, 1970).

[6] See Chapter 10 infra, at p. 150 et seq.

those effects (beneficial or otherwise) that accrue to the local populace enter into the decision. The community may be willing to give up beach or bluff property to have a power plant, but this may not be an optimal allocation of that resource on a regional basis. But the "votes" of the region are not counted -- only those of the local community affect the decision!

We might ask why a community would be willing to give up this valuable property in such a way? The answer is that the local community within its particular economic and political context is also subject to a second type of effects, called parochial effects. These accrue to the suppliers of the resource that make the investment possible. Construction workers who build the plant will spend a substantial portion of their paychecks in the locale of the plants, certainly benefiting local merchants, doctors, and bar owners. These people, in turn, spend some of this money in the locale, and so on; this creates the traditional multiplier effects on local payrolls and retail earnings. Another very important factor is the broadening of the tax base that would result from new industry. For the local community, these benefits are very real; but considering the regional economy as a whole, parochial benefits are not net benefits since those which are associated with one location will be about the same as those associated with an alternative site (barring large unemployment differentials). Parochial benefits represent a transfer payment from one place in the economy to another, with no net benefit associated with the choice of site (even though there is a net benefit to

the community chosen). Yet, parochial benefits can be overwhelmingly important to political bodies representing the local community. As a result, a local community can rationally view a project in a very different manner from the regional economy as a whole. The region and the local community feel positive and negative direct effects -- the community alone feels the parochial effects. Thus any added benefits will persuade the community to act in its perceived self-interest and approve the power plant siting, with no consideration of the negative direct effect to the region as a whole. On the Maine coast, much of the loss of shoreline property to private development came with the encouragement of state and local agencies and officials eager for new taxable property and the jobs that developments generate. John McKee, the Bowdoin land use expert, has said "it is surprising how many people will sacrifice their coast. They say, if it'll bring in the tax dollar, let's do it."[7]

Another problem with local level decision-making is its high vulnerability to vested-interest pressures. A case in point is that of the town of Harpswell on the Maine coast.[8] In 1969, a Planning Board was created to assist the Selectmen in dealing with the imminent threads of unrestricted subdivision and other exploitation of the town's land. By the 1970 town meeting, the Board and its consultant had created a land-use ordinance aimed at developers whose practices (insufficient soil surveys, inadequate sewage and water systems, etc.) were not in the best interests

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[7] Cummings, "The Late Great State of Maine", Portland Sunday Telegram, August 30, 1970.

[8] For a very interesting chronology of events, see Hutchinson, "Harpswell: What Went Wrong?", Maine Times, vol. 3, no. 2 (Oct. 9, 1970).

of the town. At the meeting, Harpswell citizens who were opposed to any form of planning argued vociferously against the plan, and their emotional arguments were fueled by fears created in part by the lobbying efforts of several local developers and contractors (who supplied voters with bus transportation to the meeting). As a result, the plan was defeated and the Planning Board was abolished at the next town meeting. As one commentator observed:

> Harpswell's future was on the line, and she stood defenseless before those who cared not for the common heritage of coastal land . . . with no planning board and no land use laws, Harpswell waits naked for the developers' invasion.
>
> What happened in Harpswell . . . could have happened in any Maine town that has not yet confronted the question of its destiny.[9]

Not all coastal communities have been incognizant of the dangers of indiscriminant development, but those which have preserved valuable resources for public use often try to assert exclusive claims to their riches. Again, this is a product of the forces of perceived self-interest:

> . . . What happens, in effect is that the resource rich communities find themselves exporting tremendous volumes of free recreation services, frequently at a substantial social cost to themselves from the operation and maintenance of facilities and from the debasement of the recreation facilities to their own residents. One reaction has been to wall out the problem by restricting the use of the resource:

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[9] Id.

> Public beaches confined to the use of local residents, stream banks, and wooded areas taken over by private 'clubs'. Carried to an illogical extreme, as such things sometimes are, the end result of this process is that a few have superlative opportunities for outdoor recreation, while the great majority must compete for the services of a limited supply of mediocre-to-poor recreation resources.[10]

At this point, we should emphasize one concept. While local governments will tend to allocate resources of regional significance solely on the basis of local needs and values, this does not imply irrational behavior on their part. A town government is charged with protecting the interests of the town residents, not the public at large. In the case of coastal towns, the best way to do this is to provide municipal beaches sufficient to fill the needs of town residents who are not shore-owners; charge discriminatory parking fees to protect these beaches from overcrowding by "outsiders"; and leave the remaining waterfront for private development to maximize the tax base. While this might be inefficient and inequitable from the regional standpoint, it serves to remind us of the undue burdens that might be placed on both the resource base and on the coastal towns under alternative arrangements. Clearly there is a need for a broader perspective, but this perspective should not be allowed to arbitrarily preempt the legitimate concerns of the coastal municipalities.

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[10] See Perloff and Wingo, op. cit. note 4 supra, at 86.

3. State and Federal Programs

As long as there was plenty of shoreline available to satisfy all the demands from competing private uses while still leaving ample opportunities for public use, there was no perceived need for state or federal intervention in the processes of the market and local political decision-making. As late as 1935, the National Park Service surveyed the Atlantic and Gulf coasts and found large stretches of unspoiled seashore areas suitable for recreation.[11] Since the trends toward massive private development were beginning to take shape, the Service recommended that 12 areas comprising some 437 miles of prime beachfront be preserved as national parks. But by 1955, only one site had actually been acquired, and all but one of the remainder had gone into private and commercial development, along with numerous other areas suitable for state reserves.[12] Even then, the need for immediate action was not fully appreciated, and private development continued to preempt most of the shore. Prior to the 1960s, the states and the federal government were not really cognizant of the coastal

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[11] See U.S. Dept. of the Interior, National Park Service, Our Vanishing Shoreline (1955).

[12] An example: In 1967 Maine citizens approved a $4 million bond issue for park and coastal acquisition, even though the legislation insisted on a provision prohibiting the use of eminent domain powers. Yet, by 1970, though prices in the meantime had doubled and quadrupled, and tens of thousands of desirable acres had changed from open space to luxury developments, the State Parks and Recreation department has spent only $567,000, less than 12 per cent of the money the voters authorized. And only part of the purchases were coastal property. See Cummings, "The Late Great State of Maine," Portland Sunday Telegram, August 30, 1970.

zone as an environment separate from other regions of the nation and in need of special attention. In the absence of any long-range plans, these governments traditionally took an incremental approach to satisfying increasing demands for shoreline recreation. States typically reacted only to short-term problems of supply, buying stretches of shoreline needed to meet the expected demands over five- or ten-year periods. But, while this was going on, potential sites were privately bought to the point where, in many areas, practically nothing remained to be developed.

In the early part of the 1960's, substantial funds began to be appropriated for the purpose of securing additional outdoor recreation opportunities for the public.[13] But even these programs have been hampered in some ways, not the least of which has been the bureaucratic process surrounding land acquisition.[14] In the first place, there is frequently a tremendous gap between authorizations and appropriations. Secondly, by the time the bureaucratic machinery grinds to the point of actual purchase (usually two to three years), considerable speculation and legal maneuvering further excalates the price of purchase or condemnation. The classic example is that of the Point Reyes National Seashore in California, originally estimated (in 1962) as costing a total of $14 million. By the time this money became available, speculation had doubled the price

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[13] See discussion in Chapter 8, infra, at p. 124.

[14] For an excellent discussion of this dimension of the problem, see Whyte, The Last Landscape, at 64-67 (1968).

tag; and by the time Congress got around to authorizing an additional $5 million (in 1966), the price gap was wider than ever. As of 1968, the estimated total cost had risen to $58 million, more than quadruple the original figure! Aside from cost factors, there are also problems with the very nature of certain federal grant-in-aid programs, which require that purchased parklands be made available to the general public, and that projects fit into a comprehensive plan designed to meet basically regional needs. In the case of coastal towns with attractive beach shoreline, this may be the last thing they want to see happen. In the first place, the burdens of beach maintenance, traffic control, general policing, and the loss of prime waterfront property taxes may place undesirable strains on the local budget. Secondly, any decreases in the overall satisfaction that accrues to the local citizenry is certain to generate strong political forces at state and local levels in opposition to proposed public beach projects. The widespread municipal practice of charging discriminatory parking fees to out-of-town users lends weight to these arguments.

4. Concluding Remarks

We have found that the organization of political activity which is relied upon as a constant check and balance on the private market can also contribute to the misallocation of coastal resources. Even if each community operates optimally within its own bounds, the total shoreline allocation will not be optimal, due to the lack of consideration of alternatives in which one community specializes in certain shoreline

functions while another specializes in some other activity. Local planning may even lead to allocations that are worse than an unrestricted market result, since whenever a local board is faced with a development proposal, its first thought is toward the secondary or parochial benefits of the project: the effect on local payroll and retail earnings, broadening of the tax base, etc. Yet, these benefits are not net benefits, but transfer payments from some other part of the economy. In addition, the planning procedure of meeting increasing demands on an incremental, piecemeal basis clearly wastes opportunities for acquisition of valuable coastal acreage that is rapidly bought and developed for private, commercial or industrial use. The absence of any long-range planning on the part of governments at all levels has clearly contributed to the formation of the situation we face today.

This concludes the discussions of the economic and political dimensions of the shoreline recreational situation. What remains to be explored at this point is the legal dimension, and for this we now turn to Part Two of the report.

PART TWO

The Legal Dimension

CHAPTER SIX

The Law of the Seashore

1. Introduction

In any society, the integrity and orderly conduct of economic and political processes depend on the law, which is best viewed as a process of creating, maintaining, and restoring an equilibrium in social affairs.[1] Through the legal system, social values and moral attitudes chrystallize into constraints and guidelines for "right action" in decision-making, thus enabling members of society to calculate the consequences of their conduct. And when individual conduct is disruptive of the equilibrium in social order, the law functions to restore it. By making it possible to predict with assurance what others will do[2] and by

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[1] See generally, Berman & Greiner, The Nature and Functions of Law, at 28-36 (2nd ed., 1966).

[2] As the venerable Oliver Wendall Holmes once asserted:

> The prophecies of what the courts will do, in fact, and nothing more pretentious, are what I mean by the law.

Holmes, "The Path of the Law" 10 Harv. L. Rev. 61, at 461 (1897).

guaranteeing the enforcement of this prediction through the powers of government, legal regimes interject an element of certainty in economic and political processes which facilitates voluntary transactions and arrangements. For example, a private market system relies on the existence of discrete "units" of production which an individual can possess to the exclusion of all others upon payment of a price. The legal system proscribes the violation of this "exclusion" principle through the construction of private property rights and their protection at law.

When referring to shoreline resources in a technical sense, it is clear that they are all part of an interrelated environmental system. The interactions of land, air and water form a complex mosaic of biological, chemical, and physical processes which must be dealt with in its entirety when managed from the ecological perspective. But the seashore has historically been managed from a social perspective, particularly with respect to the needs and desires of individuals, and the legal regimes governing activities in shore areas reflect this orientation. The maintenance of social order in the land-sea interface has required a legal delimitation between public and private rights which is artificial in the sense that it does not correspond to the "wholeness" of the environment. So in order to begin to understand the legal dimensions of the shoreline recreation problem, it is necessary to identify four distinct

physiographic areas as comprising the "legal" seashore: 1) the water itself; 2) tidelands[3]; 3) submerged lands[4] other than tidelands; and 4) upland (dry) areas[5]. All of these are integral to most shoreline recreational activities, but in varying degrees. For example, a day at the beach will generally entail spreading a blanket on an upland sandy area, walking over the tidelands and submerged lands, and swimming in the water. Similarly, a public boat launching facility would require access and support facilities in upland areas, wharves or ramps built on the tideland and submerged land, and water on which to float one's craft. While the recreationalist considers these areas as a single entity -- the seashore -- the law makes distinctions among them that are very complex. The purpose of this chapter is to outline these legal distinctions in connection with public recreational rights.

2. Public Ownership in the Seashore

The proximate source of public and private rights in seashore areas is ownership, an analysis of which must begin with English common law. Sovereign authority over land, the jus privatum or private title,

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[3]The tidelands refer to the land between ordinary high and low tides, covered and uncovered successively by the ebb and flow thereof. See Blacks Law Dictionary, at 1656 (4th ed. 1951). For an extensive discussion from the technical side, see Shalowitz, 1 Shore & Sea Boundaries, at 84-89 (1962).

[4]Submerged lands are adjacent to the tidelands on the seaward side and refer to those lands covered by water and below the low tide line.

[5]Upland areas are adjacent to the tidelands on the landward side and extend inland from the ordinary high tide line.

was historically vested in the Crown, and after the Norman conquest of England, the King extended this authority to the sea and the lands beneath it.[6] Since the original source of most land titles in England was a grant from the Crown[7], it thus became possible for the title or other exclusive rights in any portion of the seashore to be conveyed by the King to individual subjects. By the time of the Magna Charta, private ownership under this doctrine had proliferated to the point of substantial interference with commercial activities in the nation's waterways.[8] This initiated a gradual expansion of public rights in tidelands and navigable waters, which culminated in the application of the "public trust" theory to these areas by the English common law.[9] Under the public trust, certain public rights -- a jus publicum -- were reserved[10] or held "in trust" for the common use and benefit of the public, even if proprietary title had been granted to individual subjects.[11] Such was

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[6] See generally Angell, A Treatise on the Right of Property in Tidewaters and in the Soil and Shores Thereof (1st ed. 1826); Farnham, Waters and Water Rights (1904).

[7] See 3 American Law of Property, s. 12.1 (Casner ed. 1952).

[8] Note, "The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine," 79 Yale L.J. 762, at 765 (1970).

[9] See Angell, op. cit. note 6 supra, at 33-34.

[10] The rights so reserved were for navigation and fishing. See pp. 91-92.

[11] See Farnham, op. cit. note 6 supra, vol. 1, at 165-172.

the state of the English law at the time of the American Revolution; as a result, the thirteen original colonies, as independent sovereigns, succeeded to both the proprietary and "trust" interests held by the Crown[12], which they retained upon formation of the Union (subject to any rights surrendered to the Federal government by the U.S. Constitution[13]). In addition, each of the non-colonial states took on these attributes of sovereignty upon their admission to the Union, as required under the "equal footing" provision of the U.S. Constitution.[14] In a long line of cases beginning in 1842[15], the U.S. Supreme Court confirmed state ownership of the tidelands and submerged lands beneath navigable waters, and it established that these lands are to be held in trust for the people of the respective states.[16] Furthermore, it is clear that the rights in tidelands and lands under navigable waters within state boundaries are essentially a matter of state law[17], and it is generally understood that

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[12] Shively v. Bowlby, 152 U.S. 1, 14 Sup. Ct. 548 (1894); Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842). See also Stone, "Public Rights in Water Uses and Private Rights in Land Adjacent to Water" 1 Water and Water Rights 179, at 194-195 (Clark ed. 1967).

[13] Id. See also discussion infra, at p.89.

[14] For an extensive discussion, See Leighty, "The Source and Scope of Public and Private Rights in Navigable Waters," 5 Land and Water L. Rev. 391, at 414 et seq. (1970).

[15] These cases are cited in Stone, op. cit. note 12 supra, at 192 n. 61.

[16] Id. at 195, notes 76-78. This of course does not preclude conveyance by the state, so long as the "trust" is upheld. See infra, at p.90 et seq.

[17] Shively v. Bowlby, 152 U.S. 1 (1894); Barney v. City of Keokuk, 94 U.S. 324 (1876); Pollard v. Hagan, 44 U.S. (3 How.) 212 (1845).

title to these beds gave the state the right to control the use of the overlying waters.[18] In sum, then, early American law held that each state owned the title to tidelands and lands under navigable waters within their respective boundaries and controlled them -- together with the waters -- subject to a public trust. The title to upland areas, of course, remained within the realm of purely proprietary interests. At this point, three questions present themselves: What are the boundaries within which state ownership/trusteeship applies? What is the definition of navigability for purposes of title determination? and What is the scope of the rights derived from ownership and protected under the trust? These must all be examined insofar as they relate to the shoreline recreation situation.

With respect to boundaries, the first issue is to determine the line between seaward state ownership and landward ownership by private littoral owners, i.e. where does the tideland end and the upland begin? In 1935, the Supreme Court held that the common law rule normally applicable is the mean of all high tides over a considerable time, and this is the federal test.[19] A number of states, however, have chosen not to follow this rule, and have designated the low-water mark as the appropriate line[20]; other states sometimes apply rules which extend the boundary

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[18] See Sax, Water Law, Planning and Policy, at 294 (1968).

[19] Borax Consolidated Ltd. v. Los Angeles, 296 U.S. 10, at 26 (1935).

[20] Massachusetts (Great Colony Ordinance of 1647, ch. 53, s. 3); Maine (Sinford v. Watts, 123 Me. 230 (1923)); New Hampshire (Midd v. Hobbs, 17 N.H. 524 (1845)); Delaware (Harlan & Hollingsworth Co. v. Paschall, 5 Del. Ch. 435 (1882)); Pennsylvania (Palmer v. Farrell, 129 Pa. 162 (1889)); Virginia (Va. Code Ann. s. 62.1-2 (1968)); Georgia (Ga. Const. art. I, s. 6).

landward beyond the high-water mark.[21] The second boundary issue concerns the seaward limits of state sovereignty. Between 1947 and 1950, a series of cases in the Supreme Court established coastal state boundaries as the low-water mark of the seas.[22] This caused a storm of controversy, which resulted in the enactment of the Submerged Lands Act of 1953[23], which quitclaimed to the states title to the beds of the marginal seas along a belt extending three miles (or three marine leagues in the case of Texas and the Gulf coast of Florida) seaward of the coastline.[24] These submerged lands and their overlying waters were thus, in effect, added to the tidelands as subject to the sovereign control of the state.

The third class of submerged lands in addition to tidelands and lands beneath the marginal sea includes the beds of internal waters, i.e. waters lying on the landward side of the territorial baseline. According to the common law rule, title to these submerged lands depends on whether or not they are "navigable".[25] The federal test, as handed down in the

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[21] Louisiana (La. Civ. Code Ann. art. 451); Texas (Luttes v. State, 159 Tex. 500 (1958)); In Washington, the mean high tide has been equated with the vegetation line. See Harkins v. Del Pozzi, 50 Wash 2d. 237 (1957).

[22] U.S. v. California, 332 U.S. 19 (1947); U.S. v. Texas, 339 U.S. 707 (1950); U.S. v. Louisiana, 339 U.S. 699 (1950).

[23] 43 U.S.C. secs. 1301-15 (1970).

[24] In subsequent litigation, the coast line applicable to each state was held to be the baseline of the territorial sea as adopted by the Convention of the Territorial Sea and the Contiguous Zone (Geneva, 1958). See U.S. v. California, 381 U.S. 139 (1965).

[25] In a number of jurisdictions, state title extends to tidelands that are non-navigable. See Baer v. Moran Brothers Co. (mudflat), 153 U.S. 287 (1894); U.S. v. Turner (bay) 175 F.2d. 644, 647 (5th Cir. 1949);

(Footnote continued on next page)

landmark Supreme Court case The Daniel Ball[26], defines navigable waters as those which "are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."[27] This test is applicable to the issue of bed title, since the beds of navigable waters within state boundaries passed to the states upon their admission to the Union as part of the transfer of territorial sovereignty from the federal government. If the waters in question were navigable by the federal test at that time, the beds automatically passed into state ownership.[28] It should be pointed out that this federal test for navigability is mandatory only when bed ownership is at issue[29]; there are a variety of other situations in which alternate forms of the navigability criteria are applied at the state level.[30]

(Footnote continued from previous page)
Roberts v. Baumgarten (creek) 110 N.Y. 380 (1888); Schultz v. Wilson (marsh) 44 N.J. Super. 591 (1957); But see State v. Pacific Guano Co. 22 S.C. 50 (1884) where title to the bed of a non-navigable tidal creek was awarded to a riparian proprietor. For a general discussion see Teclaff, "The Coastal Zone -- Control over Encroachments into the Tidewater," 1 J. of Maritime Commerce and Law 291, at 254-257 (1970).

[26] The Daniel Ball, 77 U.S. (10 Wall.) 557, (1870).

[27] Id. at 563.

[28] See Leighty, op. cit. note 14 supra, at 421-422.

[29] Id. at 433, 436.

[30] These include the extent of public rights to surface use under state law when beds are privately owned; correlative rights of riparians in the same situation; rights of access to the water by private riparians and the general public; and certain specific rights under state laws. See Leighty, op. cit. note 14, supra, at 398.

In applying the above considerations to the recreational seashore, it seems clear that the public has rights attendant to state ownership and/or trusteeship in just about every conceivable area touched by coastal waters. It is hard to imagine any coastal shoreline area (other than the upland) that is not either tideland, submerged land beyond the baseline of the territorial sea, or land beneath navigable waters.[31] Consequently, the issue of public rights in the seashore boils down to the following two questions: what is the extent of water-based rights derived from state ownership or protected from alienation through trusteeship? and how can the public welfare be represented in the upland areas? The remainder of this chapter will deal with the first of these issues, while the remaining chapters of Part Two will address the second.

3. Public Rights in Coastal Waters, Tidelands, and Other Submerged Lands

When title to tidelands or lands beneath navigable waters is owned by the state, the public almost always has the right to use the bed itself as well as the surface of the overlying waters for recreational purposes.[32]

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[31] This is especially true if one agrees with the assertion that navigable waters and their tributaries include "just about anything you can think of that flows." See Pearson, Significant Government Activities Concerning Coastal Waters and Estuarine Areas, LL.M. Thesis at Harvard School of Law, at 10, (May, 1972)

[32] See Leighty, op. cit. note 14 supra, at 420. For a discussion of the precise scope of these rights under state law, see Leighty, "Public Rights in Navigable State Waters - Some Statutory Approaches," 6 Land and Water L. Rev. 459 (1971).

Even when waters are non-navigable for title purposes with the bed in private ownership, many states allow public surface use for recreation.[33] Whereas the waters off the coastal shoreline are generally navigable and thus imprinted with a public trust, the states have utilized this trusteeship "to maintain a public right of use for a wide variety of purposes, including not only navigation and fishery, but the whole spectrum of recreation uses as well."[34] Any such uses protected by state ownership or trusteeship are, of course, subject to the federal navigation servitude, which allows the promotion of navigation of the United States to supersede other interests.[35] But in the absence of any conflicting paramount national interest,[36] recreational rights in any given body of water are a matter of state law, and the states are free to develop their own tests for navigability, determine the disposi-

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[33] Schoenbaum, "Public Rights and Coastal Zone Management," 51 N.C. L. Rev. 1, at 19 (1972). See also Comment, "Water Recreation - Public Use of 'Private' Waters," 52 Calif. L. Rev. 171, 172 (1964); Sax, op. cit. note 18 supra, at 294 n. 3.

[34] Sax, op. cit. note 18 supra, at 294.

[35] See Morreale, "The Navigation Power and the Rule of No Compensation," 3 Nat. Res. J. 1 (1963).

[36] While it is possible that national supervision of the navigational aspects of recreational boating would be required under this doctrine as the number of pleasure boats increase, we are here concerned primarily with recreation activities taking place on or near the shore. In this case, paramount national interests are hard to envision. See Leighty, op. cit. note 14 supra, at 439-440.

tion of state-owned lands, and regulate rights to surface use.[37] Of these, it is the express conveyance or grant of state-owned tidelands to private parties which poses the greatest potential threat to public recreational rights. By the same token, it is the trusteeship associated with such areas that presents the greatest opportunities to preserve these public rights.

We should re-emphasize the point that there is no general prohibition against state disposition of trust properties, as long as the interests of the public are safeguarded or furthered by the purpose of the disposition.[38] In its landmark decision in Illinois v. Illinois Central Railroad,[39] the Supreme Court commented upon the constraints imposed by the trust:

> The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be

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[37] The Supreme Court has held that these powers are inherent attributes of soverignty in the respective states. See U.S. v. Texas, 339 U.S. 707, at 716-717 (1950); U.S. v. Oregon, 295 U.S. 1, at 14 (1935). If any states "choose to resign to the riparian proprieter rights which properly belong to them in their sovereign capacity it is not for others to raise objection." Barney v. City of Keokuk, 94 U.S. 324, at 338 (1876).

[38] See cases cited in Stone, op. cit. note 12 supra, at 197 n. 83, 84. For an extensive discussion of the trust theory, see Sax, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention," 68 Mich. L. Rev. 411 (1970).

[39] 146 U.S. 387 (1892).

> disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of peace.[40]

Within these broad guidelines, the court made it clear that it was left for the states to define the extent of public rights in trust properties,[41] (i.e. the tidelands and lands beneath navigable waters). While a few states are guided by statutory law on the subject,[42] the common-law is the primary means of identifying the scope of rights protected under the trust.[43] And since the trust principle was inherited from the English common law along with state ownership of tideland and lands beneath navigable waters, this is the logical starting point in the search for public recreational rights in these areas. In England, the oldest and most completely protected public right in tidelands is that of navigation,[44] and public easements have been

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[40] Id. at 453.

[41] Id. at 452.

[42] See note 20 infra, at p. 85.

[43] "What is a violation of the trust is an ad hoc judicial determination depending on the facts of the particular case and the extent of the public trust according to state law." Schoenbaum, op. cit. note 33 supra, at 17. For an extensive discussion of state law in the tidelands, see Garretson, The Land-Sea Interface of the Coastal Zone of the United States: Legal Problems Arising Out of Multiple Use and Conflicts of Private and Public Rights and Interests. (U.S. Dept. of Commerce Clearinghouse No. PB-179-428, September 1968).

[44] "Of all the public trust rights, navigation is the only one that has remained unchallenged and rigorously enforced from Roman times to the present." Note, op. cit. note 8 supra, at 781.

upheld for closely related activities such as anchoring.[45] The right of the English public to non-navigation uses of tidelands that have been conveyed to private owners was extensively discussed and settled in 1821 in Blundell v. Catterall:[46]

> The case directly involved the crossing of plaintiffs tideland to gain access to the sea for bathing, but it led to an extensive discussion of the relative rights of a private owner and a person without littoral ownership but who asserted a general public right. A majority of the judges held that the public has no general right to stroll, bathe, or linger on the beach, but there was general agreement that members of the public could use privately owned tidelands for passage or access to the ocean for the purpose of fishing.[47]

Thus, the English public's rights in the tidelands were limited to navigation and fishing, with passage generally allowed when connected to these rights. The bathing case was again considered in 1904 in Brinkman v. Matley,[48] where the judges, though sympathetic, relied on the doctrine of res adjudicata[49] in holding that the earlier deliberation had been too thorough to be re-examined.

As American practice developed, it became clear that navigation,

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[45] Id., at 781, n. 73.

[46] 5 B. & Ald. 268 (1821).

[47] Stone, op. cit. note 12 supra, at 201.

[48] 2 Ch. 313 (1904).

[49] "It has been decided."

commerce, and fishing were the baseline rights protected under the trust theory.[50] These rights are upheld even in states which recognize private interests to low-water. In Massachusetts, the Great Colony Ordinance of 1647 reserved for the public the rights to navigation, fishing, and fowling in tidelands granted to littoral owners.[51] In Connecticut, where ancient usage has given upland proprietors the right to occupy tidal flats, interference with navigation is prohibited.[52] The right to passage over the tideland is frequently upheld,[53] especially in connection with navigation and fishing,[54] though this right is not universally recognized.[55] While rights other than

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[50]"....(the State's title to soils under tidewaters) is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. Illinois v. Illinois Central Railroad, 146 U.S. 387 at 482 (1892). See also Note, op. cit. note 8 supra, at 783.

[51]The Colonial Laws of Massachusetts 91 (1887 ed. reprinted from the edition of 1672); See also Michaelson v. Silver Beach Improvement Assoc., 342 Mass. 251, 173 N.E. 2d 273 at 277 (1961).

[52]"The only substantial paramount public right is the right of free and unobstructed use of navigable waters for navigation." Orange v. Resnick, 109 A. 864 at 866, 94 Conn. 573 at 580-581 (1920).

[53]See e.g. Barnes v. Midland R. R. Terminal Co., 193 N.Y. 378, at 385-386, 85 N.E. 1093, at 1096 (1908); Jackvony v. Powel, 67 R.I. 218, 21 A. 2d 554 (1941); Adams v. Crews, 105 So. 2d 584 (Fla. 1958); See also Stone, op. cit. note 12 supra, at 201.

[54]See Moore and Moore, The History and Law of Fisheries, at 96 (1903).

[55]See State v. Knowles-Lombard Co., 122 Conn. 263, 188 A. 275 (1936). In Massachusetts, passage is allowed only over the water over tidelands without any use of the land underneath. See Frankel, Law of the Seashore, Waters, and Water Courses - Maine and Massachusetts (1969).

the aforementioned have not historically enjoyed the same degree of protection, the trust concept has more recently been expanded by courts and legislatures to include park and recreational uses in tideland areas. To begin with, navigation has been construed to embrace the use of waters for boating or sailing for pleasure in any kind of water craft.[56] Some jurisdictions have recognized the right to camp or hunt on the foreshore,[57] and one New York court has held that the right of the public to use the foreshore for passing and bathing "is open to no manner of doubt."[58] In Oregon, the legislature in 1967 declared that the foreshore of the Pacific Ocean is owned by the state and is to be preserved as a public recreation area.[59] South Carolina, in a recent report,[60] has declared a prima facie claim of title in its 450,000 acres of tidelands in and adjacent to the navigable waters of the state, which are to be "held in trust for and subject to the public purposes and rights of navigation, commerce, fishing, bathing, recreation or enjoyment, and other public and useful purposes..."[61] In California,

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[56]Silver Springs Paradise Co. v. Ray, 50 F.2d 356 (5th Cir. 1931).

[57]Allen v. Allen, 19 R. I. 114 (1895); Collins v. Gerhardt, 237 Mich. 38 (1926); Muench v. Public Service Comm., 261 Wis. 492 (1952).

[58]People v. Brennan, 255 N.Y.S. 331, 142 Misc. 225 (1931).

[59]Portions of the foreshore disposed of prior to July 5, 1947, are exempted from this law. Ore. Rev. Stat. Secs. 390.610-.690 (1968).

[60]South Caroline Water Resources Commission, South Carolina Tidelands Report, (January, 1970).

[61]See Porro, "Invisible Boundary - Private and Sovereign Marshland Interests," 3 Nat. Res. Lawyer 512, at 519 (1970).

the State Attorney General allowed the City of Long Beach to use its tidelands oil income to operate public beaches on granted tidelands on the grounds that this was "a proper trust use and purpose."[62] More recently, the California Supreme Court declared that privately held tidelands are subject to a trust that has traditionally included "the right to fish, hunt, bathe, swim, to use for boating and general recreation purposes."[63] In Florida, boating, fishing, and bathing rights in trust properties were recognized as early as 1919,[64] and in Washington, there are statutory limitations on the sale of certain parts of the foreshore in connection with public recreational interests.[65] Finally, a number of states have exhibited an increased awareness of the need to protect trust rights in areas of potential recreational interest. The Attorney General of Georgia has announced the state's claim to its marshlands;[66] the Florida Code has been amended to include natural resource conservation under the public trust;[67] the estuarine areas of

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[62] 33 Cal. Op. Att'y Gen. 152.

[63] Marks v. Whitney, 6 Cal. 3d 251, 491 P.2d 374 (1971).

[64] Brickell v. Trammell, 77 Fla. 444, 82 S. 221 (1919).

[65] Wash. Rev. Code Ann. s. 79.16.170 - 79.16.171 (1962); Ch. 120, Wash. Laws 559 (1967).

[66] Bolton, Legal Ramifications of Various Applications and Proposals Relative to the Development of Georgia's Coastal Marshes (March, 1970). Cf. Note, "Regulation & Ownership of the Marshlands: The Georgia Marshlands Act," 5 Ga. L. Rev. 563 (1971).

[67] Fla. Stats. sec. 253.122.

North Carolina have been the object of extensive study;[68] and a bill permitting a lateral right of passage below the vegetation line has been introduced in the Massachusetts legislature.[69] All these observations indicate that the public trust is a flexible doctrine which can be applied to changing public needs. One commentator has related the evolution of public rights in the tidelands to the pressures of supply and demand:

> Fishing and passage over the shore were probably the uses for which there was the greatest public demand and serious need at the time when the question of public rights was being determined in the various states. Since that time, the serious public demand for access to the sea has been expanded by the widespread pursuit of such recreational activities as water skiing, spear fishing, skin diving, and a much more widespread desire to hunt, fish, swim, and sunbathe.
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> The principle that the public has an interest in tidelands...and a right to use them for purposes for which there is a substantial public demand may be derived from the fact that the public won a right to passage over the shore for access to the sea for fishing when this was the area of substantial public demand.

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[68] Rice, Estuarine Lands of North Carolina: Legal Aspects of Ownership, Use, and Control (April, 1968). In North Carolina, private owners of lands littoral to navigable waters have rights to construct piers or wharves, but this right cannot be used to interfere with the public right to use navigable waters for recreational purposes. See Capune v. Robins, 273 N.C. 581, 160 S.E.2d 881 (1968); N.C. Gen. Stat. s. 146 - 12 (1964).

[69] S.804 (1973).

> The law regarding the public use of property held in part for the benefit of the public must change as the public need changes.[70]

4. Concluding Remarks

It seems clear from the foregoing discussions that public recreational rights in the waters, tidelands, and other submerged lands of the coastal shoreline are, in many cases, firmly established. The greatest degree of protection stems from state ownership, while the interpretation of the public trusteeship in these areas has frequently expanded to include recreational rights. This is not to say that significant threats of encroachment in the tidal zone do not still exist. In fact, the trust concept often fails to prevent indiscriminate disposition of tidelands and must be "shored-up" by various forms of regulatory control over potentially destructive activities.[71] With respect to the shoreline recreation situation, however, it is probable that the larger part of the problem of public rights stems from private ownership of littoral property above the high water line, i.e. in the upland of the seashore. Though the waters and submerged lands may very well be open to the

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[70] Stone, op. cit. note 12 supra, at 201-202. The words of two prominent jurists are particularly appropriate in this regard: "We may not suffer (the law) to petrify at the cost of its animating principle." Justice Cardozo in Epstein v. Gluchin, 233 N.Y. 490, 135 N.E. 861 (1922); "Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society." Brandeis, in "The Right to Privacy," 4 Harv. L. Rev. 193 (1890).

[71] For an extensive discussion of both the trust concept and state jurisdiction over activities in the coastal zone, see Teclaff, op. cit. note 25 supra.

public, the seashore cannot be effective as a complete recreational resource without the use of uplands held by shorefront proprietors. Since this use is seldom forthcoming these days, public exclusion has become the rule of the coastal shoreline:

> The littoral owner not only may forbid public crossing of his land to the shore, but also....he has a private right to cross the foreshore to the water himself. In this way subdivision projects form Beach Clubs or the like, with virtual claim of monopoly; an increase in privatism over communism which finds expression in signs "Private Beach, Public Not Allowed."[72]

On this note, it is appropriate to turn to the following chapter, where a consideration of the legal principles applicable in upland areas will commence.

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[72] Wiel, "Natural Communism: Air, Water, Oil, Sea, and Seashore," 47 Harv. L. Rev. 425, at 452 (1934).

CHAPTER SEVEN

Common Law Principles and Public Recreational Rights

1. Introduction

It is often the case that, when issues of political sensitivity begin to emerge from the social mileau, it is the judiciary that fashions the initial policy response and paves the way for subsequent legislative action. This has been true to a certain extent with respect to the shoreline recreation situation, where courts in Texas, Oregon, California, Florida, and New York have applied a number of common-law principles to preserve public rights in upland areas of the seashore. The purposes of this chapter are to review these principles as well as the case law and related statutory provisions which have relied on them; and to outline recent developments at the federal level which these "beach cases" have prompted.

2. Prescription

Prescription is one means by which rights in real property can be acquired, and it is the principal legal theory governing the creation of public easements in privately-owned land. The doctrine holds that such an easement can be created through continuous, open, and adverse use of the land in question, without permission of the owner. In most states, prescrip-

tion is authorized by statute, and the period over which adverse use must take place is frequently specified.[1]

In Downing v. Bird,[2] the Supreme Court of Florida set forth the typical elements necessary for the establishment of a prescriptive right in land:

> In either prescription or adverse possession, the right is acquired only by actual, continuous, uninterrupted use by the claimant of the lands of another, for a prescribed period. In addition, the use must be adverse under claim of right and must either be with the knowledge of the owner or so open, notorious, and visible that knowledge of the use by and adverse claim of the claimant is imputed to the owner. In both rights the use or possession must be inconsistent with the owner's use and enjoyment of his lands and must not be a permissive use, for the use must be such that the owner has a right to legal action to stop it, such as an action for trespass or ejectment.[3]

Prescription has very recently been applied in a straightforward manner to a beach case in Florida, City of Daytona Beach v. Tony-Rama, Inc.[4] The defendent corporation owned a stretch of beach and operated a recreational pier extending across this property into the Atlantic Ocean. The dispute centered on the granting of a building permit to the defendant for the

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[1] In California, however, the public may not take prescriptive easements in land. See People v. Sayig, 101 Cal. App. 2d 890, 226 P. 2d 702 (1st dist. 1951).

[2] 100 So. 2d 57 (Fla. 1968).

[3] Id. at 64-65.

[4] 2 ELR 20511 (Dist. Ct. App. Fla. August 31, 1972).

purposes of constructing an observation tower on the soft sand area adjacent to the pier. Claiming that the public had acquired a prescriptive recreational easement in the area, a group of citizens and taxpayers had won a judgement in their favor, which the appellant sought to overturn. The court found that the public had actually, continually, and uninterruptedly used and enjoyed the soft sand area for a wide range of recreational purposes for over twenty years; that the public's use was adverse under an apparent claim of right and without material challenge or interference by anyone purporting to be the owner of the land; and that the city had maintained the area, policed the flow of traffic and the parking of vehicles, and otherwise exercised the police power over the area for the general welfare of its users. These circumstances fell well within the precedent of three earlier Florida cases, such that a finding in favor of the public's right to a prescriptive easement was readily forthcoming. In addition, the court ruled that the city was empowered to exercise supervisory jurisdiction over the area and to authorize the construction of lifeguard towers, sanitation facilities, or other such structure not inconsistent with the public easement.

The only other beach case which has relied upon the prescription theory is Seaway Co. v. Attorney General,[5] a landmark Texas case decided in 1964. Prior to this time, the rule of law as established by the Texas Supreme Court in 1959 had been that fee ownership of the sandy areas of the beaches of the state above mean high tide were for the most part in private ownership.[6]

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[5] 375 S.W.2d 923 (Texas Civ. App. 1964).

[6] See Luttes v. State, 159 Tex. 500, 324 S.W.2d 167 (Tex. Sup. 1959).

This controversial ruling precipitated the enactment by the legislature of the Open Beaches Act of 1959,[7] which declared a presumption that the public had a prescriptive right to use the beach seaward of the vegetation line, and authorized the Attorney General to defend this right.[8] In Seaway, the court utilized the statute only insofar as the mandate to the Attorney General was concerned,[9] although the clear legislative policy embodied in the Act undoubtedly affected the outcome. The Seaway Company owned a portion of the beach on Galveston Island, and had erected barriers to exclude the public from the upland dry sand area below the vegetation line.[10] The court ruled against the company in finding that the public had made continuous use of the beach over the requisite 10-year period according to statutory law; and that adverse use for roadway and recreation purposes had been established because "whoever wanted to use it did so....when they wished to do so without asking

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[7]Chap. 19, Acts of the 56th Legis., 2nd Called Session (1959), as amended by Chap. 659, Acts of the 56th Legis., Regular Session (1965). Codified as Texas Rev. Civ. Stat. Ann., Art. 5415 d. V.A.T.S.

[8]For a detailed discussion of the Act by its author, see Eckhardt, "The Texas Open Beaches Act," The Beaches: Public Rights and Private Use, Texas Law Institute of Coastal and Marine Resources, Conference Proceedings, at 7 (January, 1972).

[9]The issues surrounding the declaration of the presumption of the public right will be discussed further infra, at pp. 115-116.

[10]It is interesting to note that such exclusion did not become a common practice until after the 1959 decision (note 6 supra), because private landowners apparently had assumed all along that the beaches were owned by the public, having been used for at least a century prior to 1959. See Newman, "The State's View of Public Rights to the Beaches," The Beaches, op. cit. note 8 supra, at 12.

permission and without protest from the landowners."[11] In addition, the court was able to rely heavily on a number of roadway cases since the beach had long been used as a public highway.[12]

A third beach case which discussed the prescription theory but did not rely on it was State ex rel. Thornton v. Hay.[13] Here, the court refuted defendant's argument that the general public cannot acquire prescriptive beach rights because actions in ejectment or trespass cannot be brought against it. The court acknowledged this point but pointed out that public exclusion is possible through posting and fencing the land. Other arguments were similarly refuted, indicating again that the prescription doctrine can be effectively applied as a means of preserving public rights in private beaches, when the circumstances are appropriate.

3. Customary Rights

At the other end of the spectrum from the prescription theory, at least in terms of frequency of application, is the doctrine of customary rights, which holds that immemorial observance of a custom may accord it the

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[11] 375 S.W. 2d 923, at 936 (1964). The finding of adverse use was also used to justify a holding that a public easement has been dedicated. This will be discussed further infra, at p. 105.

[12] See discussion infra, at p. 107.

[13] 254 Ore. 584, 462 P. 2d 671 (1969). However, the trial court ruling which was affirmed by the Supreme Court relied heavily on the prescription theory. No. 27-102 (Ore. Cir. Ct., January 3, 1969 -- unreported).

force of law under certain circumstances.[14] A custom is defined as a "usage or practice of the people which, by common adoption and acquiescence, and by long and unvarying habit, has become compulsory, and has acquired the force of law with respect to the place or subject-matter to which it relates."[15] This doctrine has been revived for application to the beach case in State ex rel. Thornton v. Hay,[16] where the Supreme Court of Oregon specifically selected it over implied dedication and prescription on the grounds that beaches, by virtue of their unique character, deserve the special treatment that the custom doctrine can provide. The case involves a suit brought by the state against a motel owner who had fenced off part of the beach (to which he held title) beyond high tide and below the vegetation line for use by motel patrons only. In ruling against the defendant, the court found that the public had enjoyed uninhibited use of the state's beaches throughout its

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[14]The circumstances providing the test for the custom doctrine are as follows:
(1) it must be ancient
(2) right must be exercised without interruption
(3) use must be reasonable and peaceable
(4) boundaries of use must be certain
(5) custom must be obligatory and not inconsistent with other customs or laws.
For a historical analysis of the doctrine, see Note, "Public Access to Beaches," 22 Stan. L. Rev. 564, at 582 et seq. (1970).

[15]Blacks Law Dictionary 461 (4th ed. revised 1968).

[16]No. 27-102 (Ore. Cir. Ct. 1969), affirmed on other grounds, 254 Ore. 584, 462 P. 2d 671 (1969). In this case, the court acted pursuant to an Oregon statute that was virtually identical to the Texas law discussed infra. See Ore. Rev. Stat. secs. 390. 610-.690 (1968). However, as in the Seaway case, the court did not pass on the constitutionality of the statute, relying on common-law grounds as a basis for the decision.

history, and this usage was sufficient to create a customary right of recreation that precluded the private owner from excluding the public.[17]

4. Dedication[18]

Dedication is generally defined as "the devotion of property to a public use by an unequivocal act of the owner, manifesting an intention that it shall be accepted and used presently or in the future."[19] To be complete, dedication depends both on the intention of an owner to offer land or some interest or easement therein as well as acceptance by the public; and both of these can be either express or implied. One commentator has summarized the concept as follows:

> Common-law implied dedication comprises a system of judicially created doctrines governing the donations of land to public use. No formalities are necessary; conduct showing intent by the owner to dedicate land and an acceptance by the public completes the dedication. Both intent to dedicate and acceptance may be implied from public use. An owner's inaction may be taken as evidence of acquiescence in public use and thus of his intent to donate the land. The public use itself may be taken as evidence of acceptance.
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> Once the implicit offer has been accepted, the owner cannot revoke his dedication. The public cannot lose its rights through non-use or

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[17] Id., at 673.

[18] For an in-depth analysis of issues only touched upon herein, the reader is referred to Note, "Public Access to Beaches," 22 Stan. L. Rev. 564 (1970).

[19] McQuillin, 11 The Law of Municipal Corporations (3d ed. revised), sec. 302, pp. 627-630.

> adverse possession. The public normally takes only an easement by implied dedication, with the owner retaining the underlying fee; a few courts, however, have found dedication of a fee simple title in circumstances indicating an intent to give such a title.[20]

Prior to 1964, a number of unsuccessful attempts had been made to apply the dedication principle in beach situations. In F. A. Hihn Co. v. City of Santa Cruz,[21] the court allowed dedication of a roadway along a beach, both of which had long been used by the general public for recreational purposes, but rejected the claim of dedication of the beach as well. A similar result was arrived at in City of Manhattan Beach v. Cortelyou,[22] apparently because beaches at the time were considered in a class with infrequently-used lands such as prairies and forests. Such lands were subject to an "open-lands limitation" which presumed that their owner had allowed public use under a revocable license, since it was thought that occasional use would not be sufficient to put an owner on notice of a public claim. The limitation was generally relaxed in roadway cases, but for some ambiguous reason the courts preferred to classify beaches with much less frequently-used wildlands.[23] Evidently the courts felt that the need for public beach areas could be adequately fulfilled elsewhere and did not warrant unnecessary incursions on private properties. In the 1960's, however, as the shortage of public beach

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[20]See Note, op. cit. note 14 supra, at 573, text and notes 45-53.

[21]170 Cal. 436, 150 P. 62 (1915).

[22]10 Cal. 2d 653, 76 P.2d 483 (1938).

[23]This issue is discussed fully in Note, op. cit. note 14 supra, at 579.

opportunities in many areas became increasingly apparent, dedication came to be viewed from a new perspective, and in Seaway Co. v. Attorney General,[24] the principle was successfully applied to a beach case for the first time. In Seaway, the court found an intent to dedicate by relying on the same evidence of adverse use that it had used to establish a prescriptive easement.[25] In addition, the fact that the beach had long been used as a public highway[26] -- the most common context within which public easements have been dedicated -- had substantial precedential value. The open-lands limitation was similarly laid to rest in the 1969 Oregon case, State ex rel. Thornton v. Hay,[27] where the trial court upheld the dedication of an easement and noted that heavy recreational use by the public over a 60-year period could hardly be construed as putting beaches in a category with other unimproved lands.

The next instances of beach dedication for public use were litigated in the California Supreme Court in 1970, which ruled on two similar cases, Dietz v. King and Gion v. City of Santa Cruz, in a single opinion.[28] In Dietz, a beach and its access road had been continuously used by the public for 100 years until 1959, when the King family attempted to discontinue

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[24] 375 S.W. 2d, 923, at 936 (Tex. Civ. App. 1964).

[25] See supra, at p. 102. While dedication and prescription are theoretically distinct, the line between them was completely obscured in this case. See Note, op. cit. note 14 supra, at 577-578.

[26] The beach had a history of roadway use extending back over a century to when it was used as a stagecoach route.

[27] No. 27-102 (Ore. Cir. Ct., 1969), affirmed on other grounds, 462 P. 2d 671 (1969). See discussions supra, at pp. 103-105.

[28] 2 Cal. 3rd 29., 84 Cal. Rptr. 162, 465 P. 2d 50 (1970).

this use. In Gion, the plaintiff sought a determination of his right to develop three parcels of oceanfront property which has been used for a number of years by the public and which had been maintained by the City of Santa Cruz for more than five years. The court granted recreational easements in both cases on the following grounds:

> ...common law dedication of property to the public can be proved either by showing acquiescence of the owner in use of the land under circumstances that negate the idea that the use is under a license or by establishing open and continuous use by the public for the prescriptive period. When dedication by acquiescence for a period less than five years is claimed, the owner's actual consent to the dedication must be proved... .....When, on the other hand, a litigant seeks to prove dedication by adverse use, the inquiry shifts from the intent and activities of the owner to those of the public.[29]

Since adverse public use had been well-established in both cases, the court was able to rely on the latter of these two rationales while avoiding the problem of dealing with the owner's intent to dedicate. As one commentator has noted, these cases "helped render the distinction between an easement acquired by implied dedication and one acquired by prescription almost non-existent,"[30] in much the same way as the Seaway case had done in Texas. Finally, the open-lands limitation was once again set aside:

> One of the most interesting aspects of the Gion case is its holding that there is no presumption that use of land by the public is by implied license of the owner. Thus the implied license

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[29] Id., at 38.

[30] Comment, "Public Rights and the Nation's Shoreline," 2 ELR 10179, at 10188 (Sept. 1972).

> to use open lands appears to have fallen to the passage of time in California. Owners must now show affirmatively that they granted the public a license to use, or they must demonstrate that they have made bona fide attempts to prevent public use....
>
> Thus, what Texas and Oregon have attempted to accomplish by statute the Supreme Court of California has accomplished in part by judicial decision. In these three states, at least, the burden of proof is on the landowner to overcome a prima facie showing that the public has established a right to the use of the shoreline.[31] (Emphasis added).

Dedication of beaches has been used not only to validate claims of public use in favor of private owners, but also to enforce rights of the public at large vis-a-vis local residents. In Gerwitz v. City of Long Beach,[32] a 1971 ordinance was held invalid which restricted to local residents use of a municipally-owned beach that had been used by the public at large for over thirty years. The court found that there had been a complete and irrevocable dedication of the park to the public at large; that the intent of the city to so dedicate was manifest in its official actions, including supervision, maintenance, and the collection of admission fees; and that the element of acceptance by the public at large can be inferred from the use that was made of the beach over a considerable period of time.[33] Furthermore, the court suggested that when it is a municipality that is making the dedication, "the element of acceptance really is not required, or if the element of acceptance

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[31] Id.

[32] 330 N.Y.S. 2d 495 (1972).

[33] Id. at 505.

is to be insisted upon, it may be implied from the very act of dedication by the municipality."[34] Finally, the court held that when the city dedicated the property, it put itself in the position of holding that property subject to a public trust for the benefit of the public at large, so that it may not be diverted to other uses or sold without express legislative authority.[35] Since the facts in Gerwitz were such that the application of dedication theory was straightforward, further discussion will be confined to the public trust aspects of the case.

5. The Public Trust Doctrine[36]

As discussed in Chapter 6, the public trust doctrine has found application to the seashore insofar as the protection of public rights in the tidelands and lands below navigable waters are concerned. On the other hand, no broad trusteeship governs the upland portion of the seashore, since the general rule is that early land titles granted by the federal government to private individuals ran to the high water mark and included the dry-sand portion of the beach. The trust concept has, however, managed to creep ashore in some areas through a less direct route. As American practice in

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[34] Id., at 505.

[35] Id., at 509.

[36] For an in-depth analysis of the issues only touched upon herein, the reader is referred to Comments, "Public Rights and the Nation's Shoreline," 2 ELR 10179. See also Note, "Water Law - Public Trust Doctrine Bars Discriminatory Fees to Non-residents For Use of Municipal Beaches," 26 Rutgers L. Rev. 179 (1972).

the environmental field has developed, the public trust has become a useful tool for the protection of parklands,[37] and beaches and other shoreline areas that have been purchased by government for public recreational use are clearly public parks. Trust properties of this sort are generally characterized by a three-fold limitation on the authority of government as trustee: (1) the property cannot be sold; (2) the property must be maintained for particular types of public uses impressed with the trust; and (3), the property must be available for use by the general public.[38] These restrictions as applied to beach/park situations were reviewed in the previously-discussed case of Gerwitz:

> ...Public parks occupy a special position insofar as the public at large are concerned, and this is borne out by numerous expressions to that effect found in the decisions of this state. (Citations omitted) Attempts to divert public park property to other uses have often been restrained....
>
> The view that land which has been dedicated to use as a public park may not be diverted to another use or alienated finds support in the decisions of other states (citations omitted).[39]

As we have seen, the issue in Gerwitz was the exclusion of non-residents

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[37] See Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

[38] See Sax, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention," 68 Yale L. J. 471, at 477 (1970).

[39] 330 N.Y.S. 2d 495, 2 ELR 20524 at 20528 (1972). But see Paepcke v. Public Building Commission of Chicago, 46 Ill. 2d 330 (1970), which allowed the construction of a school on park lands that had been dedicated to public use, on the grounds that legislative permission could be found in a number of broadly-worded statutes.

from the use of a town beach, and this was invalidated on the grounds that the public trust protects the rights of the public at large and not just the local populace. A similar ruling was applied to a New Jersey beach case, Borough of Neptune City v. Borough of Avon-by-the-Sea,[40] where non-residents of Avon-by-the-Sea were charged higher user fees than residents for use of a municipally-owned beach area.[41] The purpose was to defray the municipal costs incurred through non-residential use, which was alleged to have caused a $50,000 town deficit. A lower court found that this was "cogent and compelling justification" for the establishment of disproportionate fees based on residence,[42] but this was reversed by the New Jersey Supreme Court. The court held that the upland area of the Avon beach had been dedicated for recreational uses and that "the public trust doctrine dictates that the beach and the ocean waters must be open to all on equal terms and without preference and that any contrary state or municipal action is impermissible."[43] Thus, as in Gerwitz, the Avon decision affirmed the right of non-discriminatory access to trust properties; but the court in Avon apparently had a broader

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[40] 61 N.J. 296 (1972).

[41] In New Jersey, the question of absolute exclusion of the public at large had been settled in 1954, when a trial court in Brindley v. Borough of Lavallette invalidated an exclusionary ordinance on the grounds that New Jersey law forbids individual discrimination among citizens. 33 N.J. Super. 344, 110 A. 2d 157 (Law Div. 1954).

[42] 114 N.J. Super. 115, at 123, 274 A. 2d 860, at 865 (Law Div. 1971). A 1950 New Jersey law had empowered coastal boroughs to regulate their beachfront and charge reasonable fees. N.J. Stat. Ann. s. 40:92-7.1 (1967).

[43] 61 N.J. 296, at 309 (1972).

interpretation of the scope of this concept:

> The court does not explain, however, why the right of access prevents municipalities from reasonable discrimination between resident and non-resident beach users. A reasonable explanation is that the court has extended the common law notion that impediments to public trust property are impermissible.
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> Under Avon, it appears, an impediment need no longer physically intrude upon the trust property, nor need it be physical in nature. The imposition of a discriminatory fee constitutes an impediment.[44]

6. Prospects and Problems of the Common-Law Approach

The increased judicial protection of public rights in the seashore represents the first constructive step towards counteracting the erosion of public recreational opportunities in the nation's coastal shoreline. Through the application of a variety of common-law doctrines in the seven "beach cases" discussed above, the courts of a few progressive states have fashioned meaningful responses to the need for recognizing the land-sea interface as a uniquely valuable environmental resource, deserving of special treatment. These courts have exhibited a willingness to adjust the interpretation of traditional concepts to meet the challenges of new situations in modern times. Some doctrines (prescription, dedication, public trust, custom) have been expanded[45] or revived, while others (open-lands limitation, presumption of

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[44] Note, op. cit. note 36 supra, at 182-183.

[45] By 'expanded' I mean that the courts have basically had little trouble in overcoming relatively minor conceptual problems occasioned by the application of these doctrines in new and somewhat unconventional contexts.

revocable license) have been narrowed according to their relevance to the issues at hand. In some cases (Oregon and Texas), these judicial developments have been facilitated by the existence of statutes which clearly reflect legislative approval of activities serving to protect the public interest in the shoreline.[46] In addition to being broad policy statements, these statutes create a presumption that the public has a prescriptive right to use a beach by virtue of the fact that it is a beach. Though constitutionally untested, this shifts the burden of proof to the littoral proprietor to overcome a prima facie showing that the public has established its right to make recreational use of the upland portion of the seashore.

The common-law approaches described above seem to have great potential for preserving existing opportunities for public use of the shoreline. In Chapter 3, we noted that the effective supply of public recreational resources was being adversely affected by the increasing tendency of private owners to restrict access to seashore areas previously open to the public, and by the municipal practice of excluding non-residents from the use of local facilities. As we have seen, there are legal tools now available to reverse these trends, and it may even be possible that these same tools can be used to increase shoreline availability to the public. For example, recreational easements that have been created through prescription or dedication by informal public use may significantly reduce the value of littoral property, making it economically feasible for government to purchase or condemn

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[46] Ore. Rev. Stat. secs. 390.610-.690 (1968); Texas Rev. Civ. Stat. Ann., Art. 5415 d., V.A.T.S.

the land and open it up to more intensive use. Secondly, it has been suggested that the presumed existence of a prescriptive easement for public use be extended to all sea beaches of the United States, and this has been incorporated into proposed federal legislation, the National Open Beaches Act of 1971.[47] If enacted and allowed to stand,[48] this rebuttable presumption could broaden the base of litigation confirming public rights on the nation's beaches. Finally, there is speculation that the public trust doctrine may find application, at least in one jurisdiction (New Jersey), to privately owned shorefront areas heretofore considered well beyond the reach of the doctrine.[49]

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[47] S.631, H.R. 4951, 92d Cong. 1st Sess. (Feb., 1971), by Sen. Henry Jackson (D-Ore) and Hon. Robert Eckhardt (D-Tex), author of the Texas Open Beaches Act. The bill declares the beaches of the United States to be impressed with a national interest and that the public shall have free and unrestricted right to use them as a common to the full extent that such public right may be extended consistent with such property rights of littoral owners as may be protected by the Constitution. The rules applicable in considering evidence in connection with the existence of public rights are as follows: (1) a showing that the area is a beach shall be prima facie evidence that the title of the littoral owner does not include the right to prevent the public from using the area as a common; (2) a showing that the area is a beach shall be prima facie evidence that there has been imposed upon the beach a prescriptive right to use it as a common.

[48] The legal intricacies of rebuttable presumptions are beyond the scope of this analysis. For a discussion of the concept in relation to the beach situation, see generally The Beaches: Public Rights and Private Use, Proceedings of a Conference sponsored by the Texas Law Institute of Coastal and Marine Resources, Univ. of Houston (Jan., 1972).

[49] The possible repercussions of the Avon decision on privately owned shorefront property in New Jersey is discussed in Note, op. cit. note 36 supra. See also Comment, op. cit. note 36 supra, at 10191.

While judicial attention to the recreational problem is an encouraging sign, there are two major problems with the common-law approach which preclude its effectiveness as a tool of public policy. In the first place, the decisions we have reviewed apply only in the respective states where the cases were adjudicated,[50] and even then the scope of the rulings is not always clear.[51] It is also not clear whether or not courts in other states will be so inclined to dispose of minor conceptual problems such as the adverse use requirement that the landowner have a remedy at law, such as ejectment or trespass, that can be applied to the general public. The second and most severe difficulty with recreation planning through judicial action is that it is not planning at all. To begin with, it is subject to much uncertainty, depending as it does on case-by-case and jurisdiction-by-jurisdiction adjudication. Furthermore, the approach is too closely tied to the conduct of littoral owners, who may now feel sufficiently threatened to take steps to obviate the possibility of legal challenge. And even when challenge is possible, the practical difficulties of bringing action to determine the public's right in every stretch of beach may be enormous.[52]

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[50] In New York, for example, a 1935 decision refused to accept the customary right doctrine as a valid means of creating an easement for bathing in a private beach area. See Gillies v. Orienta Beach Club, 159 Misc. 675, 289 N.Y.S. 733 (1935).

[51] In Oregon, there is some question as to whether the court's decision in Thornton applies to all state beaches or only to the litigant's property. See Note, op. cit. note 18 supra, at 564.

[52] In the case of presumption, for example, an assistant attorney general in Texas has testified that "if a private landowner contests the public's right to use the beaches, our office must introduce the same positive, concrete proof required in common-law proceedings concerning easements and implied dedication. We just cannot win on a presumption." Newman, "The State's

(Footnote continued on next page.)

Thus, if large stretches of beach begin to be fenced off by private owners and there is not prompt action to enforce the public right, the discontinued use that results may be sufficient to extinguish any easement that might have been enforced.[53] Another source of uncertainty is the balancing process that the courts rely on in assessing the extent of the public right. Recently, there has been a perceived need to enhance the public's position in the seashore, but as this trend continues and begins to lead to more substantial ingringement on private interests, the courts may back off, especially if there is a concurrent backlash in the climate of political opinion. Finally, posing the recreation issue solely in terms of public v. private rights not only might lead to inefficient oscillation by the courts, but also to inequity in the determination of who benefits and who pays. The Avon case is a perfect example of this problem. While it is reasonable to expect the public at large to have access to all municipal beach areas, it is also reasonable that the town residents should not be required to shoulder a disproportionate share of the costs of maintenance. But there is little room for consideration of the

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(Footnote continued from previous page.)
View of Public Rights to the Beaches," The Beaches, op. cit. note 48 supra, at 11. In the case of customary rights, proof of public use from the beginning of a state's history may be hard to come by indeed.

[53]"The problem of giving notice of the public claim becomes extremely severe when the public has remained silent for many years after ceasing to exercise its easement. More fundamentally, taking by public use may be justified because the owner has in effect opened the door to the public; if no one complains for many years after that door is closed, the original justification is lost." Note, op. cit. note 18 supra, at 579.

latter of these issues when the trust doctrine is applied as it was in Avon, where the question as to what is a reasonable fee and what is an exclusionary fee was not directly addressed by the court.

On balance, the negative aspects of the common-law approach seem to outweigh the positive aspects insofar as its usefulness as a long-run tool of public policy is concerned. Decision-making with regard to the allocation of recreational resources among competing private and public demands must come through a rational, coordinated planning process, one which is not subject to the myriad uncertainties of fragmented adjudication of individual cases on the basis of conflicting rights. Furthermore, and perhaps most compelling, the common-law doctrines may not apply to a large enough portion of the total coastal shoreline to make a significant dent in the overall problem. All this is not to say that judicial activity will not continue to play an important role in connection with the shoreline recreation situation. Rather than serving as the basic allocative mechanism, court protection of public rights should continue to provide a stimulus to legislative action and the necessary legitimization for a new perspective on coastal resource policy. With this in mind, we will now turn to an examination of the regulatory tools that can be applied through administrative action to the shoreline recreation problem.

CHAPTER EIGHT

Shoreline Aquisition for Public Use

1. Introduction

As we have seen, the dilemma posed by an increasing demand for and a decreasing supply of public recreational opportunities in the coastal shoreline has prompted a modicum of legislative and judicial activity. The aim has been to preserve existing public rights to use certain portions of the seashore - including some municipally-owned facilities - for recreational purposes. While these events represent an important beginning, the basic problem is far from solved. Opening up municipal beaches to the general public won't really make a dent in the potential demands, and it remains to be seen how far the legal doctrines discussed in Chapter 7 can be carried in upholding public claims in privately-owned shorelands. More importantly, we must remember that the expansion of public opportunities requires that trade-offs be made with other socially-desirable objectives. Striking a balance among private recreation, public recreation, conservation, and other uses of the seashore is a management problem and as such is the proper domain of the legislatures and their duly authorized agents. Posing the issue merely

in terms of public vs. private rights improperly places the burden of seeking an optimal resource distribution on the shoulders of the courts, who are ill-equiped and hesitant to deal with management issues of such great complexity. Furthermore, reliance on judicial determination of public rights on a case-by-case and juridiction-by-jurisdiction basis interjects enormous uncertainty into what should be a coherent and orderly planning process.

The management of coastal resources must be dealt with within the framework of the allocative system outlined in Chapters 4 and 5, i.e. the combined mechanisms of the private market and collective (governmental) action. We have noted the economic fact of life that the private market, left alone, will under-produce certain desirable commodities under certain circumstances. Public beaches and clean air, are examples of such commodities - often referred to a "public goods" - the provision of which requires some collective interference with the workings of the market. But we have also noted that government activity is susceptible to certain forces which can inhibit effective allocative behavior. The real issue, then, is how to make an intelligent division of responsibility for allocative decision-making, not between government and the courts, but between the market and government. This poses two issues in connection with governmental activity: What are its possible modes of operation, i.e. the tools of public policy? and How can they be applied with equity and efficiency? In the remaining chapters of Part Two, we will deal primarily with the first of these issues. The purpose is to outline

how governmental bodies can compel, induce, or otherwise influence conduct regarding the use of land so as to expand public recreational opportunities in the nation's shoreline. Included will be an examination of the power of government to uphold this component of the public interest through the expenditure of public funds and through police power regulation. Hopefully, this will put us in a better position to comment on the issue of effective government action in the concluding chapter of the report.

Before proceeding, we should note that a beach is essentially an open space and a public beach is essentially a public park, so the applicable law is basically that which has been developed in the areas of open space and recreational planning. However, coastal beaches have an extra dimension in that they are part of the special environmental system that characterizes the land-sea interface. In the first place, the seashore has an element of physical uniqueness unmatched by other forms of urban parks and open spaces, and is particularly well suited to provide for scenic, aesthetic, historic, and other active and passive forms of public recreation not generally available in alternative locations. In the second place, the seashore has the element of ecological vulnerability arising from its integral relationship not only with the sea but also the land beyond the beach. Beaches, then, are open spaces and parks, but they are also scarce, irreplaceable, and socially-valuable natural resources; in this sense, they can properly be considered the commom property of all.

2. Acquisition Through Purchase and Condemnation

The most direct and frequently-used method of securing beach areas for public recreational use is for a public agency to buy them, either through purchase or condemnation of the fee simple or an easement. It is firmly settled that the federal government[1], the states[2], and municipalities[3] (when authorized by the state) have the constitutional capacity to purchase or condemn land for park and recreational purposes. The power of eminent domain has repeatedly been held to be an inherent attribute of the soverign, necessary for effective government operation.[4] This power is limited by the United States Constitution's Fifth Amendment provision, "nor shall private property be taken for public use, without just compensation"[5], which also applies to the states.[6] With regards the

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[1]Federal spending for recreational purchases cannot be challenged in a taxpayer's suit, and therefore raises no issue of constitutional legitimacy. Massachusetts v. Mellon and Frothingham v. Mellon, 262 U.S. 447 (1923). The power of the federal government to condemn land was first established in Kohl v. United States, 91 U.S. 367 (1875). The validity of federal condemnation programs can of course be challenged in eminent domain proceedings.

[2]See cases cited in Williams, Land Acquisition for Outdoor Recreation - Analysis of Selected Legal Problems, Outdoor Recreation Resources Review Commission Study Report No. 16, at 2-7 (1963). See also cases cited in Shoemaker v. United States, 147 U.S. 282, 13 S.Ct. 361 (1839), and United States v. Gettysburg Elec Ry., 160 U.S. 668, 16 S.Ct. 427 (1896).

[3]Id.; See also Du Prev v. City of Marietta, 213 Ga. 403, 99 S.E. 2nd 156 (1957).

[4]See Nichols, 1 Eminent Domain, s. 3.11 [1] (3d. ed., 1950).

[5]See Boom Co. v. Patterson, 98 U.S. 403 (1878).

[6]Missouri Pac. Ry. v. Nebraska, 164 U.S. 403 (1896); By this time, limitations of "public use" and "just compensation" had been imposed on all state governments by their constitutions or judicial rulings.

requirement that the taking be for a public purpose, it has long been held that parks and other recreational facilities are legitimate objectives of public land use.[7] A companion limitation on eminent domain powers is the "necessity" test. While the courts have generally considered this a matter for the discretion of the legislature or their appointed administrative bodies[8], some have shown a willingness to consider how far in advance of immediate needs governments should condemn land.[9]

Since 1911, when the Weeks Act provided for the purchase of private lands to create national forests, the federal government has had its own park and forest programs. Today there exist a number of national parks bordering the coast[10] which provide passive recreational opportunities, while a series of national seashores[11] are available for active recreation. More signifi-

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[7] Village of Lloyd Harbor v. Town of Huntington, 4 N.Y. 2d 182, 149 N.E. 2d 851 (1958); Yosemite Park & Curry Co. v. Collins, 20 F.Supp. 1009 (N.D. Cal. 1937).

[8] See Hagman, Urban Planning and Land Development Control Law, Chap. 14, n. 27 at 315 (1971).

[9] The courts are divided on this issue. Compare Grand Rapids Board of Education v. Paczewski, 340 Mich. 265, 65 N.W. 2d 810 (1954).(Schools not needed for 30 years; acquisition of land for sites did not meet necissity test.) with Carlov Co. v. City of Miami, 62 So. 2d 897 (Fla.) cert. denied 346 U.S. 821 (1953) (Airport on inaccessible island clearly not needed for some time; city has both power and duty to provide for future needs and should not be limited to present exigencies.)

[10] These include Acadia, Me.(1919); Olympic, Wash.(1938); Virgin Islands (1956).

[11] Cape Hatteras National Seashore(1937), 16 U.S.C. s. 459 (1970); Cape Cod (1961), Point Reyes (1962), Padre Island (1962), Fire Island (1964), Assateague Island (1965), and Cape Lookout (1966). See 16 U.S.C. ss. 4596-4599 (1970).

cantly, the federal government has in the last decade or so provided grants to states, counties, and cities for the acquisition of land for open spaces, parks and related uses.[12] The most important of these have been the open-space program[13], begun in 1961, and the Land and Water Conservation Fund program of 1965.[14] The open-space program, administered by the Dept. of Housing and Urban Development (HUD), authorizes matching grants of up to 50 per cent to both states and local public bodies in urban areas for the acquisition and limited development of, among other things, open space for park and recreational purposes. Funds are appropriated by Congress each year ($100 million for fiscal 1973). Proposed projects must be in areas of "urban character" (this includes the suburbs), be important for carrying out an open-space program as part of a comprehensive plan for the

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[12] For an exhaustive description of federal grant-in-aid programs for recreation, see U.S. Dept. of the Interior, Bureau of Outdoor Recreation, Federal Outdoor Recreation Programs and Recreation Related Environmental Programs (1970). A most recent federal activity in this area is the Surplus Property Program, which authorizes the Dept. of the Interior to turn over surplus federal real estate to localities for park purposes at very low prices or free of charge. 40 U.S.C. s. 485, 50 App. U.S.C. s. 1622. As of June, 1972, 144 such properties had been made available for recreational use, covering 20,000 acres in 39 states and Puerto Rico, and mostly located in urban areas. Council on Environmental Quality, Environmental Quality - Third Annual Report (1972), at 138.

[13] Title VII of Housing Act of 1961 (42 U.S.C. s. 1500), amended by Title IV of Housing and Urban Development Act of 1970 (Pub. L. 91-609). This program has recently been combined with urban beautification and historic preservation programs into a single comprehensive grant process, the A-95 Review Program.

[14] 16 U.S.C. s. 460-(1) et seq.

entire urban area, and be permanently reserved for open space uses.[15] Under recent evaluation guidelines, HUD gives priority to Model Cities projects, low-and-moderate-income housing effects, and opportunities for employment of minority persons associated with the proposed project, while low ratings are given the preservation of scenic or ecologically significant areas.[16] While this might seem to afford beach acquisition a low priority, we should remember that the most pressing needs for water-oriented recreation opportunities are in urban areas where they can be made available to less mobile, lower income groups.

While the HUD open space program serves many non-recreation objectives, the Land and Water Conservation Fund Program has as its major purpose the provision of outdoor recreational opportunities, especially in urbanized areas.[17] The Fund, administered by the Bureau of Outdoor Recreation, is financed through revenues from four sources (user fees at federal outdoor recreational areas; the sale of surplus federal real property; the federal motorboat fuel tax; and off-shore oil and gas leases) and can be supplemented by advance appropriations by Congress, to be repaid in later years. The minimum funding is $300 million annually through 1989.[18]

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[15] Ells, "Massachusetts Open Space Law", Open Space and Recreation Program for Metropolitan Boston (1969), at 91-93.

[16] Dawson, "Massachusetts Open Space Law Supplement-1972", 4 Open Space and Recreation Program for Metropolitan Boston (1969), at 36.

[17] Ells, op. cit.,note 15 supra, at 94.

[18] Dawson, op. cit., note 16 supra, at 36.

These monies can be use to finance 50 per cent of the cost of preparing and maintaining outdoor recreation plans, and acquiring land and water areas for outdoor recreation in accordance with a comprehensive statewide outdoor recreation plan. This program has been widely recognized as the most far-reaching recreation measure yet enacted by Congress.

At the state level, many large-scale open space programs have been launched in the last decade. Such programs often include state acquisition[19], grants-in-aid to local governments[20], and authorization and encouragement of land acquisition by municipalities for park and recreation purposes.[21] At the local level, a few states have authorized the creation of municipal conservation commissions, a relatively new and potentially effective tool with flexible legal powers.[22] The commission is generally a town board

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[19] See, e.g. Green Acres Land Acquisition Act of 1961, N.J. Stat. Ann. ss.13: 8 A-1 et seq. (1968); Ore. Rev. Stat. s. 390.360 (1971) (Highway Commission can acquire ocean shoreland for recreational purposes); Chap. 742, Mass. Acts of 1970 (state acquisition of Boston Harbor Islands). Frequently revenues are generated through bond issues. Over the period 1962-1966, voters in twenty-four states approved bond issues totalling $455 million for open-space purposes, with an average plurality of 63 per cent. Whyte, The Last Landscape, at 62-63 (1968).

[20] Though the percentage varies from state to state, typically the states finance 25 per cent of the project cost. Hence, local governments can multiply every dollar they put up by three (and sometimes four) state and federal dollars.

[21] These states include those most concerned with open space and recreation programs, such as New York, New Jersey, California, Maryland, Connecitcut and Massachusetts. See Eveleth, "An Appraisal of Techniques to Preserve Open Space", 9 Vill.L.Rev. 559 (1964) at 563, n. 21.

[22] See Ells, op. cit., note 15, supra, at 15.

empowered with the conservation, promotion, and development of the town's "natural resources", including wetlands, woodlands, open lands, birds, fish, soil, water, etc. The commissions are usually authorized to make purchases based on annual appropriations from the municipal government[23], and are also directed to conduct resource planning and education activities.

3. Past Difficulties With the Acquisition Approach

The majority of planners see governmental acquisition programs as the most desirable means of providing public recreational facilitites in the long run with minimal usurpation of private rights.[24] While this is indeed true in principle, there have been some very serious obstacles in practice. In Chapter 5, we noted that problems of cost and even motivation (especially at the local level) have severely restricted the rate at which recreational shoreline can be acquired for public use. While acquisition programs proceed at a snails pace, private development spreads rapidly with little or no consideration geing given to the extent to which future public uses are being precluded. Another factor that has inhibited the effectiveness of acquisition programs is the narrow perspective some governmental agencies have of the proper approach to recreation planning. Unfortunately,

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[23] In New Jersey, all acquisition programs must be approved by the local governing body. N.J. Stat. Ann. s. 40: 56A-1-3 (supp. 1969). In Massachusetts, town meeting approval is necessary only when state or federal assistance is sought. In 1960, the Massachusetts Self-Help Act (Act 517-1960) was passed providing financial assistance to communities which had established Conservation Commissions.

[24] See, e.g. Reis,"Policy and Planning for Recreational Use of Inland Waters," 40 Temple L.Q. 155, at 182-183 (1967).

seashore areas seem to be viewed either as massive public parks or as the exclusive domain of private owners. This assumes implicitly that public use and private enjoyment are necessarily mutually exclusive, which they need not always be. The most important geographic area for public use is the dry sand area immediately adjacent to the water and extending to the vegetation line, i.e. the beach. It is the beach that should be the proximate object of government attention, and it is important to note that its boundaries do not necessarily conform to those of the littoral owner's property. In many cases, the beach is but a portion of the shorefront property, and the cost of its acquisition may be considerably less than the cost of the entire lot, as long as multiple use can be accommodated in such a way as to preserve reasonable uses of the remaining land above the vegetation line. With proper planning, public use of the beach portion of the seashore need not completely interfere with private uses farther upland (especially since public use is highly seasonal), and the aesthetic qualities of the area need not be significantly disrupted in all cases.

A second mistake frequently made in the past and stemming from an all-or-nothing approach to beach acquisition is to forget about those areas for which acquisition and immediate intensive use by the public is not feasible. Too often, planners and government officials fail to treat the shoreline as <u>open space</u> which has the potential for future public use and therefore in need of conservation. As a result, the beaches become lined with structures built almost right on the water's edge. Not only does this obviate the possibility of future public acquisition, it is also dangerous

from ecological and safety standpoints. The well-known open space planner, William H. Whyte, has emphasized this point in a number of his publications by saying that "the most unexploited opportunity for open space action is the conservation of land in private hands."[25]

Clearly, there is a need to apply more flexible legal mechanisms to the beach recreation problem than have been applied in the past. One such technique is the acquisition of "development rights", "conservation easements", or similar interests in property at less than the fee simple.[26] Under this approach, title to land remains in private hands while the government acquires a negative[27] easement, which limits the uses to which the landowner may put his land to those not inconsistent with the rights transferred to government.[28] The compensation due the landowner is the difference in the market value of the property with and without the easement. A number of states have enacted enabling legislation providing for

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[25] Whyte, Open Space Action, Outdoor Recreation Resources Review Commission Study Report No. 15, at 22 (1962).

[26] See generally Note, "Techniques for Preserving Open Spaces", 75 Harv. L. Rev. 1622, at 1635 (1962); Comment, "Easements to Preserve Open Space Land", 1 Ecology L.Q. 728, at 731 (1972); Herring, ed., Open Space and the Law, Institute of Governmental Studies, U. of California, Berkeley, at 41 (1965).

[27] A negative easement restricts only certain private uses, whereas a positive easement secures for the public certain rights to actually use the land for certain purposes. In the case of beaches, the cost of acquiring a positive easement and of acquiring the fee simple would essentially be the same due to the degree of infringement on private uses occassioned by free public access.

[28] See Whyte, Securing Open Space for Urban America: Conservation Easements, Urban Land Institute Technical Bulletin No. 36 (Dec. 1959).

the purchase or condemnation of such development rights or similar lesser interests in land for open space purposes.[29] The approach has several advantages over fee simple acquisition, including:

1) the land continues to be taxable property though at somewhat lower assessed value;

2) private owners remain responsible for maintenance;

3) the cost may be significantly lower, thus providing a relatively inexpensive interim device for preserving the land for future acquisition for recreational purposes.

This technique seems ideally-suited for the shoreline situation, where the development rights to be conveyed to government would pertain to the erection of buildings and other structures that either preclude future public use of damage the scenic qualities of the shorefront. While there are a number of potential diaadvantages to this scheme, an elaboration of which is beyond the scope of this paper[30], the easement approach is clearly a prime candidate for future consideration as an effective policy tool.

4. Concluding Remarks

In the long run, government acquisition for public use is probably the best method of increasing the supply of recreational opportunities

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[29] N.J. Stat. Ann. s. 13: 8A-6 (1961); N.Y. Conservation Law, s. 1-0707 (c. 174 L. 1964); W.Va. Code Ann. ch. 20, s. 2215; Cal. Gov't Code secs. 6950-54 (1966) and 51050-65 (1971).

[30] For a recent and extensive discussion of the easements approach, see Comments, "Easements to Preserve Open Space Land", 1 Ecology L.Q. 728 (1971).

in the coastal shoreline. In the meantime, however, it is crucial to treat these areas as open spaces, not only becouse of their value for recreation but also because they are important ecologically and aesthetically. If the cost of traditional acquisition programs is prohibitive, the purchase or condemnation of development rights or conservation easements in the beach portion of the shorefront properties may be a viable alternative. However, there may be situations in which even this course of action is infeasible or undesirable. In the first place, the costs of preserving large stretches of shoreline with easement techniques may still be well beyond the means of government budgets. Secondly, it may be felt that, in the absence of active public use, the public should not have to pay for the protection of unique natural resources when this cost should be faced by those who threaten to damage the resources through indiscriminate use. Under these circumstances, it may be preferable to turn to public policies involving non-compensable regulations to secure the public interest. In the following chapters, we will examine the extent to which applications of the police power and related legal techniques can pick up where various forms of acquisition leave off.

CHAPTER NINE

Shoreline Regulation I: The Police Power and Open-Space Objectives

1. Introduction

In order to develop a feeling for the extent to which land-use regulation might be applied to the shoreline recreation situation, it is necessary to outline the source of the police power and the scope of its exercise in connection with the preservation of open spaces. The purpose of this chapter is to examine the constitutional limitations of the regulatory power of government and the factors considered by the courts in determining the validity of open space regulations. This will set the stage for the discussions in Chapter 10 of the specific tools that can be utilized to meet open space objectives in seashore areas.

The police power is essentially the authority of government to regulate the activities of individuals in order to foster public health, safety, morals, or the general welfare. It is, in effect, the right of government to legislate in the public interest[1] and has been held by the Supreme Court to be "inherent in every sovereignity to the extent of its

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[1] See Lawson v. Steele, 152 U.S. 133 at 136-137 (1894); In Chicago B.&Q. Ry v. Illinois ex rel Drainage Comm'rs, 200 U.S. 561, at 592-594 (1906), the Court held that the police power "embraces regulation designed to promote the public convenience or the general prosperity."

dominion."[2] This authority does not flow from constitutional sources but from the courts, who have affirmed the police power as integral to the concept of government. Ever since the landmark Supreme Court decisions of the 1920's upholding the constitutionality of zoning, the police power has been applied in numerous forms to control land-use for the health, safety, morals, and general welfare of the community. Over this period, the concept of what serves the general welfare has continually expanded. To the historical rationales of controlling density[3] and preserving property values[4] have been added aesthetic[5], cultural-historic[6], scenic[7], architectural[8] and other

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[2] License Cases, 46 U.S. (5 How.) 504, 582 (1847).

[3] The most frequently cited traditional goals of zoning are to lessen street congestion; secure safety from fire, panic, and other dangers; provide adequate light and air; prevent overcrowding of land; avoid undue concentration of population; and facilitate adequate provision of transport, water, sewerage, schools, parks, and other public requirements. See U.S. Dept. of Commerce. A Standard State Zoning Enabling Act (1926).

[4] While the preservation of property values was the most important political motivation for the widespread acceptance of zoning and other land-use controls, it was not explicitly recognized by the courts until some time later. See, e.g. Rockhill v. Chesterfield Township, 23 N.J. 117, 128 A.2d 473 (1956).

[5] See People v. Stover, 12 N.Y. 2d 462, 191 N.E. 2d 272 (1963); State v. Diamond Motors, Inc., 50 Hawaii 33, 429 P.2d 825 (1967); see also cases cited in Broesche, "Land Use Regulation for the Protection of Public Parks and Recreational Areas", 45 Texas Law Review 96, at 108-110 (1966).

[6] The Vieux Carre Ordinance in New Orleans is the best known ordinance designed to preserve a cultural-historic area. See La. Const. Art. 14, s. 22A.

[7] See Scenic Hudson Preservation Conference v. Federal Power Commission, 354 F. 2d 608 (2d. Cir. 1965), cert. denied, 384 U.S. 941 (1966).

[8] See State ex rel Saveland Park Holding Corp. v. Wieland, 269 Wis. 262, 69 N.W. 2d 217 (1955).

"amenity"[9] objectives, as well as the encouragement of the most appropriate use of land within a community.[10] In the frequently-cited case of Berman v. Parker, Justice Douglas offered the following perspective on the public welfare:

> Public safety, public health, morality, peace and quiet, law and order -- these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it... The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully controlled.[11]

Based on judicial language of this sort and the criteria developed for determining the validity of police power measures in the aforementioned areas, a number of commentators have concluded that land-use regulation for the protection of open spaces[12] as well as public parks and recreational areas[13] can readily be supported. A number of communities have, in fact, employed various forms of open space controls, including flood plain[14],

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[9]Other amenities that have been held to be within the general welfare include public enjoyment, a right to be free from unwelcome obstructions, preservation of mental well-being, comfort, and convenience. See cases cited in Broesche, op. cit., note 5 supra, at 103.

[10]See Lionhead Lake, Inc. v. Township of Wayne, 10 N.J. 165, 89 A.2d 693 (1952).

[11]348 U.S. 26, 75 Sup.Ct. 98 (1954).

[12]See Comment, "Techniques for Preserving Open Spaces", 75 Harv. L. Rev. 1622, at 1623 (1962).

[13]See Broesche, op. cit., note 5 supra, at 110.

[14]See Dunham, "Flood Control via the Police Power", 107 U. Pa. L. Rev. 1098 (1958).

agricultural[15], and recreational zones.[16] The common characteristic of all such controls is that they are designed to prevent or seriously restrict building construction in particular areas.[17] The range of objectives sought includes preservation of prime natural areas such as forests or wetlands; prevention of flood losses; protection of scenic or historic areas; control of urban sprawl; and protection of park and recreation areas.[18] In pursuing these and other open space objectives, there is always the clear possibility that government action will result in a substantial infringement on private property rights, and it behooves us to examine the approach that courts have taken in resolving the conflicts that are likely to ensue.[19]

2. Constitutional Limitation of Regulatory Power

There is general agreement that the scope of the police power has and will continue to expand as the problems of industrial society become more complex, and as government is increasingly called upon to regulate private conduct as a means of achieving desired social objectives. But this

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[15] See Ott, The Need, Constitutionality and Limitation of Agricultural Zoning, Fresno, California. (1957).

[16] This will be discussed in full infra, at p.151.

[17] In a recent article on open space law, Kusler uses the term "open space zoning" to refer to the whole range of special wetland, flood plain, lakeshore, coastal, scenic preservation, and other protection districts, in addition to the more conventional techniques of building setbacks, official mapping, and park land dedication requirements in subdivision regulations. See Kusler, "Open Space Zoning: Valid Regulation or Invalid Taking", 57 Minn. L. Rev. 1, at 5, n.5.

[18] Id. at 5, n.6.

[19] In the remainder of the present chapter, discussion will be limited to general constitutional considerations. In Chapter 10, these considerations will be applied to the specific regulatory tools that are relevant to the shorelands situation.

trend must be balanced against the claims of private persons to be protected against the unjustifiable sacrifice of their individual rights. The bulwark for these claims is the U.S. Constitution, whose provisions as interpreted by the courts limit the scope of the police power. The Fourteenth Amendment to the U.S. Constitution states that "nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws." This "due process" doctrine establishes a baseline standard of fairness and requires that "the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."[20] A companion requirement which has been incorporated[21] into the Fourteenth Amendment states that "nor shall private property be taken for public use, without just compensation."[22]

In a series of cases beginning in 1926, the Supreme Court established broad guidelines with respect to the constitutionality of regulatory measures designed to control the use of land. In Euclid v. Ampler[23], the first Supreme Court test of zoning, the court spoke to the issues of reasonableness and the relation of regulatory measures to the goal desired:

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[20]Nebbia v. New York, 291 U.S. 502, at 525 (1934).

[21]Chicago B. & Q. R.R. v. Chicago, 166 U.S. 226, 235-41 (1897).

[22]U.S. Const. amend. V. We should note that this is never an absolute prohibition in relation to the police power, as distinguished from the power of eminent domain. The very essence of the police power is that some individual rights in property can be deprived in behalf of the general welfare, as long as the regulatory method is proper and its exercise is reasonable within the meaning of due process. See, e.g. Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, at 84-86 (1851).

[23]272 U.S. 365, 47 Sup. Ct. 114 (1926).

> The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare. The line which in this field separates the legitimate from the illegitimate assumptions of power is not capable of precise delimitation. It varies with the circumstances.... If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgement must be allowed to control.
>
> If these reasons, * * * thus summarized, do not demonstrate the wisdom or sound policy in all respects of those restrictions which we have indicated as pertinent to the inquiry, at least, the reasons are sufficiently cogent to preclude us from saying, as must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare.[24]

In Nectow v. City of Cambridge,[25] the second leading Supreme Court zoning case, the court demonstrated its willingness to consider the impact of zoning restrictions on property uses as well as on the public health, safety, and welfare.[26] Finally, in Zahv v. Board of Public Works,[27] the court reaffirmed the doctrines ennuciated in Euclid and Nectow, and then retired from consideration of zoning issues. This left the state courts with three

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[24] Id.

[25] 277 U.S. 183, 48 Sup. Ct. 447 (1928).

[26] "That the invasion of the property of plaintiff in error was serious and highly injurous is clearly established; and, since a necessary basis for the support of that invasion is wanting, the action of the zoning authorities comes within the ban of the Fourteenth Amendment and cannot be sustained." Id.

[27] 247 U.S. 325. The court affirmed the settled rule that "it will not substitute its judgement for that of the legislative body charged with primary duty and responsibility for determining the question." The court also considered the detrimental effect on property value that the regulation in question engendered, and found no clearly unreasonable or arbitrary activity by the regulatory authority.

general factors[28] to consider when determining whether a given regulatory measure constitutes a taking without due process: (1) the objectives or basic philosophy of the regulation; (2) the reasonableness of the regulations: and (3), the extent of the impact on private interests.

As practice developed at both federal and state levels, it became clear that the first two of these factors would be relatively straightforward to evaluate, and courts have developed basic approaches to each. With regard to overall objectives, the scrutiny of regulatory measures is tempered by a strong deference in favor of the legislative authority of the states to make flexible use of the police power in response to changing economic and social conditions.[29] With regard to the reasonableness of specific provisions, on the other hand, the courts have not hesitated to examine administrative actions, especially in circumstances which seem threatening to the doctrine that equally-situated property owners should be equally treated.[30] However, the evolution of judicial approaches to the question of what is a taking without due process has not been so clear cut in situations where neither the objectives nor the reasonableness of regulations is in doubt. In such cases, any growth in the concept of valid exercise of the

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[28] For an extensive discussion of these three factors, see Anderson, "A Comment on the Fine Line Between 'Regulation' and 'Taking'", The New Zoning: Legal Administrative, and Economic Concepts and Techniques, (Marcus and Groves ed., 1970).

[29] See Johnson, "Constitutional Law and Community Planning", 20 Law & Contemporary Problems 199 (1955); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

[30] The case law on "spot" zoning is illustrative of this point. See e.g. Kuehne v. Town Council of East Hartford, 136 Conn. 452, 72 A. 2d 474 (1950).

police power inevitably forces a reevaluation of situations that have traditionally been viewed as an invalid taking. This has created a "gray area, or twilight zone of constitutionality"[31] within which lies the distinction between justifiable regulation and confiscation. And since open space regulations are generally thought to be well within the scope of the police power, it becomes important to investigate the determinants of constitutionality with regards this 'taking' issue in open space cases.

3. Regulation or Confiscation?

The first factor important in the determination of whether a regulation is really a taking is the existence of a property right. It is often said that property is a "bundle of sticks", a collection of present, future, and intangible[32] interests that are capable of transfer between private owners.[33] If no property rights exist[34], there can be no taking, by definition. Property is generally taken by the acquisition of title to an interest in property, but taking can also constitute physical invasion or use, or a substantial interference by government which deprives a property owner of all or most of the beneficial use.[35]

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[31] Broesche, op. cit. note 5 supra, at 100.

[32] These include light, air, accessibility, and other intangible rights "incidental to the ownership of land itself". See Nicols, 2 The Law of Eminent Domain, secs. 6.3-6.38, 6.44 (1963).

[33] This concept of "transferability", though appearing in different forms, is common to all definitions of property for which the confiscation question applies. For example, Sax conceives of property as a multitude of existing interests, or "economic values defined by a process of competition", not inconsistent with the interests of other property owners. Sax, "Taking and the Police Power", 74 Yale L. J. 36, at 61 (1964).

In the absence of any of the above factors, the question of what is a taking without due process has never been settled with any authority by the courts. One criteria that has been espoused by a number of legal commentators is that a regulation is a taking if it is designed to benefit the public rather than to prevent harm. Strangely enough, this apparently straighforward concept has managed to elude precise definition, and its application to factual situations has failed to yield consistently satisfactory results. An early statement of the doctrine was formulated by Freund, who asserted that "the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful."[36] In 1958, Dunham attempted to establish the legitimacy of this test through empirical observation, and concluded that regulation is generally upheld when it prevents harmful eternalities (uncompensated costs on other parties) and not when a "good" is conferred on the public.[37] Nevertheless,

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[34]There is no property right to maintain a nuisance, and no property right in the public domain. See Hagman, Urban Planning and Land Development Control Law, s. 180 at 325 (1971).

[35]Id., s. 179, at 320.

[36]Freund, The Police Power, Public Policy and Constitutional Rights, s. 511, at 546-547 (1904).

[37]In reviewing a large number of cases, Dunham concluded:

> "... Where the legislation was upheld, the purpose and effect of the legislation was to allocate to a land use the costs which, but for the legislation, the activity would impose on other owners without compensation. In each instance where the legislation was struck down, the purpose and effect of the legislation was to compel one or more particular owners to furnish without compensation a benefit wanted by the public."

Dunham, "A Legal and Economic Basis for City Planning", 58 Colum.L.Rev. at 669 (1958).

the test as stated is often difficult to apply in subtle situations.[38] Probably the most rigorous statement of the general criteria was developed in 1964 by Sax, who made a distinction between the two different types of private economic loss resulting from government activity, corresponding to two different roles played by government in competitive processes. His test for the validity of a regulation followed from this distinction:

> ... when economic loss is incurred as a result of government enhancement of its resource position in its enterprise capacity, the compensation is constitutionally required; it is that result which is to be characterized as a taking. But losses, however severe, incurred as a consequence of government acting in its arbitral capacity are to be viewed as a non-compensable exercise of the police power.[39]

While this construction of the taking test embodies important insights regarding the relationship of law to the role government plays in the economic system, it does not escape the inherent drawbacks of the benefit-compelling vs. harm-preventing concept to which it is closely related.[40] It is true that when government acts in its enterprise capacity, it generally seeks to provide the public with a beneficial good or service; and, when it acts in its arbitral capacity, it generally seeks to prevent a hazard to the general welfare. But regardless of the precision with which the distinction is drawn, there still exist situations where a regulation may be said with

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[38] Hagman cites the example of flight plane zoning and asks if such regulations are designed to prevent buildings above the flight plane which could harm passengers in airplanes, or to acquire for the public good a highway in the sky. Hagman, op.cit., note 34, supra, at 326.

[39] Sax, op.cit., note 33 supra, at 62-65.

[40] Sax acknowledged this difficulty in a subsequent major article, "Takings, Private Property, and Public Rights", 81 Yale L.J. 149 (1971), in which he disowned the view that whenever government can be said to acquire resources on its own account, compensation must be paid. This will be discussed further infra, at p. 179.

equal truth to confer benefits on the public or to save it from harm. One commentator has illustrated this point with reference to the development of lands that serve as natural flood storage areas:

> ... while the filling of natural storage areas may increase flood heights on other lands and therefore result in certain nuisance-like effects, regulations which prevent such filling require one owner to maintain his land as a storage area to benefit other owners and the public.[41]

As a general rule, whenever it is the public that is the recipient of harmful side effects from certain property uses, it is artificial to attempt to classify remedial regulations as "harm-preventing" or "benefit-compelling", since the harm that is prevented is identical to the benefit that is conferred, and the terms become interchangeable.[42] In trying to deal with such situations, many courts have begun to validate regulations that could be characterized as seeking a benefit for the community.[43] In the absence of a reliable, simplified test for determining whether or not a 'taking' exists, the courts have resorted to a balancing process which weighs the societal benefit of a particular regulation against the impact on indi-

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[41] Kusler, op. cit., note 17 supra, at 18.

[42] Other frequently cited examples of this phenomenon are setback regulations for traffic safety; airport zoning; and even comprehensive zoning in general. See Institute for Governmental Studies, Univ. of California, Berkeley, Open Space and the Law, at 10 (Herring, ed., 1965).

[43] A somewhat typical response on the part of the judiciary has been to expand the concept of what is a harm that can properly be restricted to the point where it encompasses some of what were previously considered benefits. This is part of the general expansion of the concept of the "public welfare" as a permissable objective of governmental regulation. See Hagman, "Planning Legislation: 1963", 30 J. Am. Inst. Planners 247, at 251, 254 n. 23 (1964).

vidual ownership of land.[44] An early indication of judicial reliance on this process was the decision in Pennsylvania Coal Co. v. Mahon,[45] where the Supreme Court found unconstitutional a statute which prohibited mining of coal in such a way as to cause the settling of nearby residences into the ground. In finding no public interest "sufficient to warrant so extensive a destruction of the defendant's constitutionally protected rights,"[46] Holmes is thought to have forecast the balancing technique which has characterized Supreme Court as well as state court handling of due process litigation.[47] What then, are the factors that enter into this balancing process and how do they apply to the open space situation?

4. Factors in Judicial Decision-Making

In a recent article, Jon A. Kusler, a leading scholar in the field of open space law, has divided the factors relevant to the question of taking in open space regulation cases into two categories: (1) those related to public harm, including protection of public safety, prevention of nuisances, and promotion of aesthetics; and (2), those involving infringement on private

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[44] "The decisions suggest that the process is one of balancing the public good which the regulation is intended to secure against the deprivation of use value suffered by the owner of the restricted land." Anderson, op. cit. note 28 supra, at 81, See also Kusler, op. cit., note 17 supra, at 5; Anderson, 1 The American Law of Zoning, s. 2.19 at 80-81 (1968).

[45] 260 U.S. 393, 435 Sup. Ct. 158 (1922).

[46] "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking." Id., at 415.

[47] See Anderson, op.cit. note 28 supra, at 69.

property (including physical invasion, vested rights over the regulation period, diminuition of value, and denial of all reasonable use.)[48] Since most of Kusler's observations are pertinent to the topic of interest in this report, it is useful to review briefly his discussion of each of the above factors.

a. Protection of Public Safety

The degree of destruction of private property allowed by the courts has always been a function of the priority of social objectives regulations are designed to serve, and Kusler points out that public health and safety have always enjoyed a "special presumption of constitutionality."[49] Since controls that are reasonably related to these goals are almost invariably sustained, "specific provisions in open space regulations which prohibit or severely restrict uses posing threats to public safety are likely to be upheld."[50]

b. Prevention of Nuisances

Regulations designed to prevent nuisances that have adverse effects on the public welfare are generally sustained. Even when substantial financial losses are incurred by individual property owners,[51] it is thought that such individuals enjoy a reciprocal benefit in that the restrictions prohibit others from generating similar nuisances. But, as Kusler asserts, open space

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[48] Kusler, op. cit., note 17 supra, at 20 et seq.

[49] Id. at 21.

[50] Id. at 22.

[51] See e.g. Hadacheck v. Los Angeles, 239 U.S. 394 (1915).

regulations are unlike other land use controls which provide reciprocal benefits since they are generally more restrictive and benefit the regulated owners little if at all.[52] In addition, open space regulations are generally not created explicitly to prevent nuisances; their purposes are clearly to provide certain benefits to the public. Kusler concludes that the the various theories of nuisance prevention "do not lend support to open space zoning."[53]

c. Promotion of Aesthetics

If one views the promotion of aesthetics as the prevention of visual nuisances, it might be plausible to relate this class of open space objectives to traditional nuisance doctrines. However, many courts have been reluctant to sanction such a view because of the subjective nature of what is aesthetically pleasing and because amenity values have generally been accorded lower priority relative to more conventional notions of public health and safety.[54]

d. Physical Invasion

The physical invasion of land by government violates the territorial soverignity of private property, and it is almost universally held that this constitutes a taking.[55] Thus, "governmental attempts to permit the public use of private lands for parks, parking lots, golf courses and other areas,

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[52]Kusler, op. cit. note 17 supra, at 7.

[53]Id. at 28.

[54]Id. at 29.

[55]Michelman, "Property, Utility and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law", 80 Harvard L. Rev. 1165, 1184 (1967).

without compensating the landowner are likely to fail as unconstitutional takings."[56]

e. Vested Rights and the Regulation Period

The courts have generally accorded greater weight to "vested" private property rights in existing uses than to future uses,[57] but restrictions on future developments depend heavily on duration. Thus, "while interim regulations which freeze development for several years have been sustained, regulations which prohibit development of whole properties for long or indefinite periods have with little exception been disapproved."[58]

f. Diminuition of Value

The diminuition in value test was originally put forth by Holmes in Pennsylvania Coal Co. v. Mahon,[59] and attention to the extent of a landowners economic deprivation is given in almost every case involving the constitutionality of a land-use regulation.[60] However, the diminuition test by itself has not provided a consistently satisfactory criteria for

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[56] Kusler, op. cit. note 17 supra, at 32. But see Chapter 10, infra, at p. 153.

[57] See cases cited, Id., at 32 n. 108.

[58] Id. at 32-33.

[59] 260 U.S. 393, at 413 (1922). "When diminuition reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act."

[60] Anderson, op. cit. note 28 supra, at 71.

for determining whether a taking has occurred.[61] Kusler suggests that it is the effect of the diminuition in value on the reasonable use of land, and not the amount, that seems to be the crucial factor.[62]

g. Denial of All Reasonable Use

While diminuition in value is not necessarily grounds for unconstitutionality, a regulation which deprives a land-owner of all "reasonable", "beneficial", or "practical" use of his property generally effects an unconstitutional taking.[63] All of these adjectives refer in most cases to profitable uses rather than any possible use, but do not imply that a landowner must be allowed the most beneficial use of his land.[64] After reviewing a number of leading cases on the issue, Kusler asserts that open space regulation limiting lands to certain public activities may enable economic uses for rural areas with low land values, but it "is doubtful that such uses allow an economic return for recreational lands located along lakes and rivers where property values and taxes are usually high."[65]

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[61] Anderson examined approximately fifty cases in which courts specifically mentioned the diminuition in value suffered by a landowner as a result of zoning ordinances. He found that half were upheld and the other half struck down, suggesting that such loss is not a single or decisive factor where the loss is short of confiscation. See Anderson, 1 American Law of Zoning, s. 2.23 (1968); Kusler found that in fifty cases where regulations were found invalid, the weighted mean reduction in value was 73 per cent. In fifty cases validating regulations, the weighted mean value reduction was 60 per cent. See Kusler, op.cit. note 17 supra, at 33.

[62] Kusler, op. cit. note 17 supra, at 34.

[63] See cases cited Id., at 35, n. 123.

[64] Id. at 36.

[65] Id. at 41.

In addition, "regulations affecting swamps, steep slopes, erosion areas and flood hazard areas may be invalidated if the permitted uses are not sufficiently remunerative to allow economic reclamation of the lands."[66]

5. Concluding Remarks

While open space regulations have a basis in logic and are increasingly looked upon favorably by the courts as part of an expanded concept of the public welfare, they clearly stand a good chance of running afoul of well-established judicial precedents on both sides of the balancing test. With regards the potential benefit to society, there is far less precedent in support of police power measures to support specialized open space objectives, which cannot always be related to the traditional goals of public health and safety. With regards the infringement of private interests, open space regulations severely restrict building construction and reduce land values to a much greater extent than conventional zoning; and areas placed in open space zones are often subject to physical restrictions that also limit profitable use. Recognition of these potential difficulties has led Kusler to the following conclusion:

> Regulatory approaches are less likely subject to constitutional attack if they simultaneously permit private landowners some economic uses for their lands and yet considerably restrict uses in order to achieve public objectives. The key to constitutionality appears to be in this balance.[67]

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[66] Id. at 63.

[67] Id. at 65.

With this philosophy in mind, we can now turn to an examination of the specific regulatory techniques that might be applied to preserving beach areas for open-space use. This is the topic in Chapter 10.

CHAPTER TEN

Shoreline Regulation II: Land-Use Controls for Seashore Preservation

1. Introduction

From the discussion in Chapters 7 and 8 it appears that, in the long run, the availability of public recreational opportunities in the coastal shoreline will be a function of both legislative and judicial activity. Significant increases in the supply of recreational facilities can be effected through purchase or condemnation of suitable areas by administrative agencies while judicial assertion of common law rights can at least preserve the availability of seashore facilities presently used by the public at large. But if beaches and other prime recreational shorelands currently under private ownership are ever to be "reclaimed" for public use by such techniques, they will have to be treated in the interim as open spaces and regulated so as to prevent construction on at least that portion of the beach most appropriate for public use, i.e. the dry sand area between the water's edge and the vegetation line. The purpose of this chapter is to examine the specific regulatory tools that might be applied to the shoreline situations, and to evaluate these tools within the context of the constitutional factors discussed in Chapter 9.

2. Exclusive Use Zoning

The surest method of preserving a beach for recreational use would be to create a special zoning district which allows only recreation and related open-space uses. While these may be the most appropriate uses of the land in question and be consistent with broad local and regional needs, the regulation will almost certainly be declared invalid if it deprives private beach owners of any beneficial use. A long line of leading cases have verified that the degree of restriction is the controlling factor. In Arvene Bay Construction Co. v. Thatcher[1], the court declared that a zoning ordinance must leave the owner some opportunity to derive some reasonable use and benefit from his property. In City of Plainfield v. Borough of Middlesex[2], an ordinance which zoned land (which the borough had unsuccessfully tried to buy for school and park use) to discourage prospective buyers, was struck down by the courts as too restrictive, even though the land was appropriate for the zoned purpose. In Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills[3], the court struck down as too restrictive a zoning ordinance which attempted to preserve certain marsh areas in their natural state as watershed basins and wildlife sanctuaries. In Forde v. Miami Beach[4], an ordinance which had the effect of permitting only uneconomical development (single family residential in a beach area of high reclamation cost) was disallowed. Finally, in Dooley v. Town Planning and Zoning Commission of Town of Fairfield[5], a flood plain

[1] 278 N.Y. 222, 15 N.E. 2d 587 (1938).

[2] 69 N.J. Super. 136, 173 A.2d 785 (1961).

[3] 40 N.J. 539, 193 A.2d 232 (1963).

[4] 146 Fla. 676, 1 So. 2d 642 (1941).

[5] 151 Conn. 304, 197 A.2d 770 (1964).

ordinance which prohibited all uses except certain recreational and conservational activities was invalidated since there was a great dimimution in the value of the land and none of the permitted uses could reasonably yield an economic return.

Where regulations permit at least some reasonable degree of use, the courts have been divided and the decisions have varied with the circumstances. However, certain classes of objectives seem to be accorded greater priority than others. In the case of flood plain zoning, for example, ordinances are frequently upheld when they can be related to the traditionally-accepted goal of public safety.[6] The preservation of certain unique natural areas seems also to enjoy special protection in certain jurisdictions. In Walker v. Board of County Commissioners,[7] for example, an oil company's shorefront property was zoned agricultural/residential, uses of much less value than the refinery the company had intended to build. Nevertheless, the court held that the ordinance did not deprive the company of all beneficial use, and attached great significance to the stated intent of the ordinance to preserve the natural characteristics of the Chesapeake Bay area. Such cases provide a sharp contrast to the leading case of Vernon Park Realty Co. v. City of Mount Vernon,[8] where a parcel in the middle of a highly developed business district was zoned for parking only. The property was clearly profitable for parking (although more valuable for other commerical uses) and the city argued that any other use would have adverse effects

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[6] This held true even in some cases where regulations have made all development impossible, to protect against flood hazards. See Vartelas v. Water Resources Commission, 146 Conn. 650 153 A. 2d (1959); see also the discussion on flood plain zoning in Heyman, "Open Space and the Police Power", Open Space and the Law, Inst. of Gov. Studies, U. of Cal., Berkeley, at 18 (Herring ed. 1965).

[7] 208 Md. 72, 116 A. 2d 393 (1955).

[8] 307 N.Y. 493, 121 N.E. 2d 517 (1954).

on traffic congestion in an already saturated area. Nevertheless, the court invalidated the ordinance, stating that the exercise of such power is arbitrary or unreasonable "whenever [it] precludes the use of the property for any purpose for which it is adapted."[9]

From the foregoing discussion, it seems clear that three factors are highly determinative of the validity of exclusive use zones: first, the appropriateness of the land for the uses allowed; second, the degree of restriction of reasonable uses; and third, the extent of the public necessity perceived by the courts.[10] The question now is, what is the validity of exclusive recreation or open space zones in beach areas? Fortunately, one of the leading cases on zoning in general is also a beach recreation case: McCarthy v. City of Manhattan Beach.[11]

In McCarthy, the California Supreme Court sustained a zoning ordinance which restricted ocean-front property to beach recreation purposes, allowing only the operation of recreational facilities for an admission fee. To understand the full significance of this holding, it is useful to examine the facts in some detail. The plaintiffs owned three-fifths of a mile of sandy beach, varying in width from 174 to 186 feet, bordered to the west by

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[9] Id. at 499, 121 N.E. 2d at 519. It might be argued that this is a misrepresentation of the rule that an ordinance is unconstitutional only when it "so restricts the use of property that it cannot be used for any reasonable purpose." Arvene Bay Constr. Co. v. Thatcher, 278 N.Y. 222 (1938). In fact, this point was the foundation for the dissenting opinion in Vernon Park.

[10] A noted commentator has observed that "a very high degree of diminution of value of property through restriction of allowable uses may be tolerated if the public necessity is great." Waite, "The Dilemma of Water Recreation and a Suggested Solution", 1958 Wisconsin L. Rev. 542, at 608.

[11] Cal. 2d 879, 264 P. 2d 932 (1953); cert. denied 348 U.S. 817 (1954).

the Pacific Ocean and to the east by a state park. Since 1900, the land in question had been used continually by the public for beach recreational purposes, and in 1924 the city brought an action claiming that the land had been dedicated to public use. In 1938, having failed to establish the land in public ownership, the city co-operated with the plaintiffs in a number of unsuccessful attempts to persuade the county or the state to purchase the land. In 1940, the plaintiffs attempted to erect and maintain a wire fence enclosing the beach, with the intent of charging admission fees. Claiming no value for residential subdivision, they then requested that the property be rezoned under a 1929 ordinance from single-family residential to commercial. This was denied, and the plan to fence off the beach was abandoned apparently because the public had continually destroyed parts of the fence. Then, in 1941, the city adopted a comprehensive zoning ordinance which placed the plaintiff's property in a "beach recreation district." The only structures allowed were lifeguard towers, open smooth wire fences, and small signs, and the owner was permitted to charge admission fees. From 1941 until 1950, the plaintiffs made no use of their property as permitted under the zoning ordinance, and in 1950 they applied for a zoning reclassification back to single-family residential. (This was probably motivated by a desire to increase the "fair compensation" value of the property, since condemnation proceedings had been initiated at the state level but had not yet come to trial by 1950.) This was denied, and the plaintiffs attacked the ordinance on the ground that it was an unreasonable taking of property and that it was passed in bad faith to depress their property value to enable acquisition at a lower price.

In the words of one commentator, "no previous case had involved a regulation that so substantially limited the use of property and had such substantial evidence that the zoning was intended to provide the public with a beach or to make acquisition of the property less expensive."[12] Nonetheless, the court found that the plaintiffs had failed to prove that there were no beneficial uses allowed by the ordinance. Indeed, the plaintiff's case was weak in this area, since they produced no evidence as to the effect of the ordinance on the value of the property, and had in fact previously requested a classification for commercial use. And the court disposed of the "bad faith" argument by finding that no evidence had been introduced to support such a contention, and that motives are not generally within the scope of judicial inquiry anyway. With regards the 'taking' question, there were essentially two classes of evidence available to justify the ordinance as a valid police power exercise. First, the planning consultants testified that the district was part of a comprehensive zoning scheme which sought balanced uses of properties in the city; that the beachfront property was eminently suited for recreation; that the zoning classification was designed to take advantage of this unique natural resource; and that residential use would be unreasonable due to the high cost of construction and the depreciation of property values behind plaintiff's property. The second line of argument relied on more traditional grounds. There was evidence that the property was completely inundated during certain storms; that residences

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[12] Hagman, Urban Planning and Land Development Control Law, at 215 (1971).

would have to be constructed on pilings; and that the safety of such construction was fairly debatable. In addition, the chief of police testified that illicit and immoral activities could take place under the pilings, causing a police problem. In its decision, the court relied on the latter of these classes of arguments and upheld the ordinances.

In sum, the rationale of the decision was a mixture of deference to legislative judgement on matters that are fairly debatable; strict enforcement of the rule that the burden of proof is on the landowner to establish a regulation as unreasonable; and reliance on conventional police power objectives related to public health and safety. While it may be argued that the case is an invaluable precedent in beach zoning cases where some beneficial use is possible, the court unfortunately did not deal directly with the propriety of an exclusive beach recreation zone. As one commentator has put it:

> ... consideration should not have been limited to the reasonableness of residential use of the property. In other words, the question of the case should have been: "May the city validly impose such a restriction?" rather than "May the city prohibit the building of residences on the land in question?" The court's failure to treat explicitly the former (broader) question leads to the underlying ambiguity of the holding. On the one hand, the court could be saying that so long as the owner is left with an assumed profitable use, the restriction to recreation use is valid. On the other hand, the court probably is merely saying that under the circumstances and for conventional police power reasons, it was not improper to prohibit the building of residences on the beach property... It would be foolhardy to rely with assurance on the McCarthy case as indicating unequivocal judicial acceptance of recreation zoning wherever the owner can make a profit from the re-

> stricted use and the restriction is imposed as part of a comprehensive plan ....[13]

While these observations are well-taken, it does seem plausible that the three-fold rationale of McCarthy (deference to legislative judgement; some reasonable use allowed; connection to public safety and welfare) could serve as a rational guideline for future judicial review of beach recreation districts or similar forms of exclusive use zoning for the protection of littoral open space. In the first place, it is useful to ask what distinguishes McCarthy from cases such as Vernon Park where exclusive use zones have been disallowed. The answer seems to lie in the courts willingness to maintain for the legislature a degree of flexibility in dealing with the complicated process of protecting unique natural resources (as opposed to parking lots) and allocating them among competing public and private uses. If the McCarthy decision is read, as it very well might be, to encourage limited judicial interference with government in its role of correcting for market imperfections where valuable environmental assets such as the shoreline are concerned, it is indeed an important precedent. Second, we should point out that the other rationales in McCarthy can be considerably strengthened when applied to different circumstances. In McCarthy, it turned out that the entire property of the plaintiffs came under the ordinance, whereas in other situations it might be possible to zone only that portion of the shorefront lot which lies below the vegetation line, such that the remaining land is still useful for residential and other private use. Furthermore, if ordinances can be related to traditional public safety factors (erosion, flooding, etc.) the rationale is strengthened even more. Even in cases where the "unsafe use" rationale does

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[13] Heyman, op.cit. note 6 supra, at 16.

not apply, it may be possible to substitute certain aesthetic considerations to restrict construction near the water's edge. Through the years courts have shown increased willingness to sanction aesthetic considerations, especially in scenic natural areas.[14] Consider the words of the Massachusetts Supreme Court:

> Grandeur and beauty of scenery contribute highly important factors to the public welfare of a state. To preserve such landscape from defacement promotes the public welfare and is a public purpose... It is, in our opinion, within the reasonable scope of the police power to preserve from destruction the scenic beauties bestowed upon the Commonwealth by nature....[15]

3. Building Setbacks and Official Mapping

Since the real purpose of land-use controls in shoreline areas is to prevent construction which precludes future public use, it may not be necessary to designate recreation as an exclusive use of the beach. A simpler and less controversial approach which has the same ultimate effect would be to establish building setback lines, a land-use control established as a valid exercise of the police power in Gorieb v. Fox.[16] Here again, there is an advantage to regulating only a portion of the littoral property. As one

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[14] See discussion in Walker v. Board of County Commissioners, supra, at p. 152. A good example of undesirable beach construction from an aesthetic point of view is indiscriminate wharfing out in tidal areas. Albert Garreston, in a study of legal problems in the land-sea interface, found that a number of coastal communities are applying the special zoning district concept to their distinctive tideland areas in order to regulate certain private activities within the context of a comprehensive overall plan. See Garreston, The Land Sea Interface of the Coastal Zone of the United States: Legal Problems Arising out of Multiple Use and Conflicts of Private and Public Interests, New York University, at 41 (1968).

[15] General Outdoor Advertising Co. v. Dept. of Public Works, 289 Mass. 149, 185-187, 193 N.E. 799, 815-816 (1935), appeal dismissed, 297 U.S. 725.

[16] 274 U.S. 603 (1927).

commentator has noted:

> Building lines, encroachment lines, floodway limits, buffer zones, and other types of restrictions which severely restrict construction of structural uses on relatively narrow strips of land present less critical constitutional prolems than similar regulations which restrict development in broader areas, since these generally affect only a portion of each lot and portions remain available for construction.[17]

Setback lines have been approved in furtherance of all the traditional zoning objectives, including provision of light, air, privacy, and yard space for lawns and trees; reduction of fire hazards, safety hazards, and street congestion; maintenance of the general attractiveness of property and the home environment.[18] In addition, aesthetic factors have been explicitly recognized as important elements in the adoption of setback requirements. In People v. Stover,[19] it was stated that aesthetics may be an essential purpose in the establishment of setback lines. Thus, it seems that the application of building setback regulations to beach situations would be relatively straightforward. In Spiegle v. Beach Haven,[20] the New Jersey Supreme Court upheld an

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[17] Kusler, "Open Space Zoning: Valid Regulation or Invalid Taking," 57 Minn. L. Rev. 1, at 54 (1972).

[18] See cases cited in Note, "Zoning: Setback Line: A Reappraisal", 10 William and Mary L. Rev. 739, at 744 (1969).

[19] 240 N.Y. 2d 734, 191 N.E. 2d 272 (1963).

[20] 46 N.J. 479, 218 A.2d 129 (1966); But see also King v. Ocean Beach, 207 Misc. 100, 136 N.Y.S. 2d 690 (Sup. Ct. 1954), where a zoning ordinance which excluded all construction from a buffer zone was invalidated.

ordinance which prohibited construction between the mean water line and a building line (with certain exceptions related to access and beach protection). The court rejected the argument that the ordinance deprived the lands of any beneficial use on the grounds that the plaintiffs did not make a sufficient showing that they could make a safe and economic use of the land in question. Generally, the courts seem to look at the entire property to determine if a reasonable use is possible; but in cases where setback lines leave no buildable space, the restriction will most likely be invalidated.[21]

Official maps are somewhat different from building lines in that they reflect a municipality's decision to locate streets, parks, and other facilities at places marked on the map. The maps are utilized to prevent construction which may add to future condemnation costs.[22] To avoid the criticism that such a regulation is unconstitutional on its face, a number of jurisdictions have added a "shock absorber" clause which allows a land owner to improve mapped areas if he can show that the property cannot yield a fair return under the mapped restrictions.[23] Conceivably, such an enactment could apply to beach areas that a governmental agency plans to acquire at some future date. However, the application of official mapping techniques to park and open space situations has been hampered by objections to the duration of restrictions on development. In New Jersey, for example, mapping prohibitions

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[21] See Kusler, op. cit. note 17 supra, at 56.

[22] Official mapping appears to be the only device approved for this objective. See discussion and cases cited in Kusler, op.cit. note 17, supra, at 55.

[23] See N.Y. Gen City Law,s. 35; Wisc. Stat. Ann. s. 62.23 (6) (1957).

for parks and playgrounds are limited to one year.[24] And in Miller v. City of Beaver Falls,[25] the Pennsylvania Supreme Court struck down a statute which prohibited for three years all incompatible development in areas mapped for future parks. Nevertheless, a carefully designed beach mapping ordinance could conceivably preserve these coastal open space areas for near-term acquisition for public recreation use.

4. Subdivision Exaction

Under typical state enabling legislation, a municipality may require that developers obtain approval from a local planning board prior to subdivision of property. Furthermore, the municipality is authorized to require as a condition of plat approval that the landowner provide or dedicate to public use such facilities as roads and sewers,[26] or land for park or school purposes.[27] The general rationale for such a requirement in the case of schools and parks was put forth in Jordan v. Village of Menomonee Falls:

> The basis for upholding a compulsory land dedication requirement is this: the municipality by approval of a proposed subdivision plot enables the subdivider to profit financially by selling the subdivision lots as home building sites and thus realizing a greater price than could be obtained if he had sold

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[24] See discussion in Krasnowiecki and Paul, "The Preservation of Open Spaces in Metropolitan Areas", 110 U. Penna. L. Rev. 179 at 186 (1961).

[25] 368 Pa 189, 82 A. 2d 34 (1951).

[26] See Ayres v. City Council, 34 Cal. 2d 31, 207 P. 2d 1 (1949); Newton v. American Sec. Co. 201 Ark. 943, 148 S.W. 2d 34 (1941).

[27] See Zayas v. Planning Board, 69 P.R.R. 27 (1948); Billing Properties, Inc. v. Yellowstone County, 144 Mont. 25, 394 P. 2d 182 (1964).

> his property as unplotted lands. In return for this benefit the municipality may require him to meet a demand to which the municipality would not have been put but for the influx of people into the community to occupy the subdivision lots.[28]

Thus the local boards may force developers to bear part of the cost of providing parks for outdoor recreation for new residents; but where the need for such services is a general one not specifically attributable to the existence of the subdivision, the town usually must bear the cost. In the case of exaction for street dedication, on the other hand, this distinction between the needs of subdivision residents and the public at large may not be followed. In Ayres v. City Council, the court declared that "potential as well as present population factors affecting the subdivision and the neighborhood generally are appropriate for consideration"[29] by a planning board in their projections of future traffic flow over new streets.

In the case of subdivision in coastal beach areas, it has been suggested that a requirement that developers dedicate public easements for beach access where the subdivision would block existing or potential access would fit within the existing statutory framework.[30] The rationale is as follows:

> Requiring beach access is analoguous to requiring streets of the width made necessary

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[28] 28 Wis. 2d 608, 137 N.W. 2d 442 (1965), appeal dismissed 385 U.S. 4 (1966). See also Johnston, "Constitutionality of Subdivision Control Exactions: The Quest for a Rationale", 52 Cornell L. R. 871, at 917 (1967); Pioneer Trust and Savings Bank v. Village of Mount Prospect, 22 Ill. 2d 375, 176 N.E. 2d 799 (1961).

[29] 34 Cal. 2d 31, at 41 (1949).

[30] Note, "Public Access to Beaches," 22 Stanford L. Rev. 5, at 568-569 (1970).

> by a city-wide traffic flow. While it is true that most of the demand for access comes from areas outside the subdivision, the existence of the subdivision aggravates the beach-access problem. First, it may cut off existing access to beaches; second, even where no access previously existed, the new developement will raise land values and create a pattern of land use that will make it more difficult and expensive to purchase beach easements in the future.31

While this rationale seems plausible in situations where the land to be dedicated is to be used for beach access purposes, it seems doubtful whether the argument can be extended to the beach itself, in which case it would be difficult to establish the rational nexus between the exaction and the public needs created by the subdivision development.

5. Compensable Regulations

An approach similar in effect to the purchase of development rights in open space areas would be to regulate and the compensate affected landowners for losses suffered.[32] Under this scheme, the full market value of each parcel is established prior to the imposition of regulations, and this value is guaranteed to the landowner by the government agency. To the extent that the restrictions impair the value of the land for present uses, compensation is due immediately. To the extent that the potential development value of the property is reduced, the owner is awarded damages at the time of sale equal to the

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[31] Id., at 571.

[32] See Krasnowiecki and Paul, "The Preservation of Open Space in Metropolitan Areas", 110 U. Pa. L. Rev. 179 (1961).

difference between the actual sale price and the original, guaranteed value. This plan is thought to have three advantages over acquisition of fee simple or lesser interests in property:[33] (1) it has a lower initial cost, since landowners do not recoup lost development value until the property is actually sold; (2) subsequent increases in the value of the land do not affect ultimate cost to government, which is established just prior to regulation; and (3) rational planning and flexibility can be facilitated through amendments to regulations.

While the compensable regulation approach seems suited to the beach situation to the same extent as easement acquisition, some writers feel that it is subject to a greater range of administrative problems.[34] Moreover, courts have tended to give considerable weight to speculative increases in a land value when deliberating on 'taking' issues,[35] and it is not clear whether this scheme can de differentiated from other regulatory approaches designed to depress land values to lower future condemnation costs.[36]

6. Tax Techniques

A number of commentators have suggested that certain tax techniques be used in conjuction with land use regulations and other schemes to preserve open spaces, since present taxation policies may tend to undercut otherwise sound public policy measures. First, in the case of exclusive use of zoning

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[33] Id. at 199-202.

[34] See Eveleth, "An Appraisal of Techniques to Preserve Open Spaces", 9 Vill.L. Rev.550, at 571 (1964).

[35] See Kusler, op. cit. note 17, supra, at 79.

[36] See discussion in Note, "Techniques for Preserving Open Spaces", 75 Harv. L.Rev. 1622, at 1640 (1962).

and other severely restrictive regulations, property tax adjustments which take into account the reduced development value of lands can ease the financial burden imposed on the landowner.[37] Second, some attempts have been made to encourage gifts of open space land through real estate tax concessions.[38] Finally, it has been suggested that permitting landowners to treat compensation received for development rights as capital gains instead of ordinary income would encourage the voluntary sale of easements to government.[39]

Preferential tax treatment as it might apply to the beach situation seems justifiable on the grounds that it is for public purposes which are within the discretion of the legislature to promote through use of the tax power.[40] However, such schemes have been attacked on the grounds that the use of the tax powers as a tool of social policy detracts from its effectiveness as a generator of municipal revenues.[41] This creates a number of political and administrative problems, a full elaboration of which is beyond the scope of this paper.

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[37] See Kusler, op. cit. note 17 supra, at 73. See also Moore, "The Acquisition and Preservation of Open Lands", 23 Wash. & Lee L. Rev. 274, at 291 (1966).

[38] Eveleth, op. cit. note 34, supra, at 574.

[39] Delogu, "The Taxing Power as a Land Use Control Device", 45 Denver L. J. 279, at 285 (1968).

[40] See Note, op. cit. note 36, supra, at 1641.

[41] See Walker, "Loopholes in State and Local Taxes", 30 Tax Policy 4 (Feb. 1963).

7. Concluding Remarks

It is evident from the foregoing discussion that a wide variety of regulatory techniques might be effectively applied to the preservation of beaches as unique open space areas. The purposes of such open-space regulations seem to fall within the scope of the general welfare; and many courts have shown substantial deference to legislative judgement together with a willingness to strictly enforce the rule that the burden of proof is on the landowner to demonstrate the unreasonableness of regulatory measures. In addition, the particular nature of the shoreline situation is such that non-compensable open space regulations are likely to be validated on a number of grounds. When the techniques outlined in this chapter are examined in relation to the factors considered by the courts in determining whether or not a 'taking' exists in open space cases, the result seems favorable. With regards the prevention of public harm, regulations which prohibit construction below the vegetation line are often supportable on grounds of public safety, aesthetics, and ecological considerations. With regards the infringement on private property rights, non-compensable regulation may have less to commend it since the natural characteristics of recreational shoreline may inherently limit its value to residential or some commercial uses, thereby increasing the probability that the land will be rendered valueless if frozen in its natural state.[42] However, we have noted that controls over the use of the waterfront need not preclude relatively normal uses of upland portions of littoral property. While there may be a substantial diminution of value as a result of

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[42] See Fonoroff, "Special Districts: A Departure from the Concept of Uniform Controls", The New Zoning: Legal, Administrative, and Economic Concepts and Techniques, at 86 (Marcus & Groves ed. 1970).

such controls, the courts often tend to give greater consideration to the range of reasonable uses that are left unobstructed for the property as a whole.

We might conclude from the above observations that carefully drafted open space ordinances regulating the use of seashore stand a good chance of weathering constitutional storms with regards the issue of taking without due process. Nevertheless, there are some potential weaknesses in regulatory schemes that must be considered in the development of public policy guidelines and the choice of alternative techniques. The first potential difficulty is that the regulatory objectives may not be widely accepted, or at least the opposition may be an extremely vocal and influential minority. Since the courts hesitate to substitute their judgement for that of the legislature as to what are reasonable means to worthy ends, they often look for strong enabling legislation to legitimize controversial objectives. Such legislation is not yet generally available in the shoreline recreation case; aside from the Texas and Oregon statutes discussed in Chapter 7, state legislation to protect public rights in the uplands portion of the coastal shorelines has been enacted in only a few states. In Washington, a 1901 statute declared the state's foreshore to be a public highway,[43] and in 1963 this highway was extended to the vegetation line and declared to be a public recreation area.[44] In Hawaii, a 1970 statute mandated the Land Use Commission

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[43] R.C.W.A. 79 16.170 -- 171.

[44] Wash. Laws, 1963, ch.212.

to establish setback areas of between 20 and 40 feet from the edge of vegetation growth, while counties are authorized to extend the setback areas further inland if appropriate.[45] In addition, much of the land seaward of the vegetation line has been placed in Conservation Districts.[46] Finally, both Wisconsin and California[47] have enacted subdivision regulations governing shorefront developments, but these require the provision of access only for the use of tidelands or the water. In sum, although the larger general issue of coastal zone management has received considerable attention of late,[48] for the present many courts must rely on the broad guidelines set forth in standard zoning and planning enabling acts in passing on controversial open space regulations, and this may increase the likelihood that such regulations will fail the judicial test of reasonableness.

A second potential difficulty with non-compensable regulation is that courts are often wary of control measures that are designed to lower future condemnation or purchase costs.[49] Although the courts do not generally inquire into motives, they will examine the circumstances surrounding a given regulation to see whether or not it was designed to lower values rather than

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[45] Act 136 - 1971. Hawaii also has a special statute which prohibits the construction of a beach at Waikiki unless legal arrangements are made to guarantee public use of any such beach within 75 feet shoreward of the mean high water mark. See Hawaii v. Willburn, 49 Hawaii 651, 426 P. 2d 626, at 628 (1967).

[46] See Matter of the Application of Ashford, 76 P. 2d 440 (1968).

[47] Cal. Bus. & Prof. Code, secs. 11610.5(a), 7 (a) (West Supp. 1971).

[48] See discussion in Chapter 11, infra at p.170.

[49] See Hagman, op. cit. note 17 supra, at 188.

to serve some legitimate purpose.[50] To avoid this problem in shoreline regulations, it would seem desirable to restrict the focus to current open space objectives rather than to any recreation objectives regarding the long-term utilization of the resources.[51]

As a third and final precaution regarding the use of open space regulation we should point out that the courts are particularly sensitive to situations where governments have traditionally payed to secure public use and then attempt in later instances to achieve the same results through regulation without compensation. It should be noted, however, that the shoreline situation does not completely fit within this framework, since regulation of beaches and other recreational resources is intended to preserve them as open spaces, not necessarily open them up for public use, which is the traditional purpose of acquisition. On the other hand, when conservation easements or compensable regulations are considered for use as policy tools, it may be difficult to combine them with regulatory measures that do not require payment. The appropriate mix of control techniques will, of course, depend on the legal and practical circumstances surrounding any given resource base.

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[50] See Grand Trunk W. Ry v. City of Detroit, 326 Mich. 387, 40 N.W. 2d. 195 (1949); 2700 Irving Park Bldg. Corp. v. City of Chicago, 395 Ill. 138, 69 N.E. 2d 827 (1946); Galt v. Cook County, 405Ill. 396, 91 N.E. 2d. 395 (1950).

[51] Consider, however, the McCarthy case, where the town's classification of plaintiffs property as a beach recreation district was obviously designed to maintain public use of the beach. Though the plaintiffs charged that the town schemed to lower the condemnation costs for the parcel, the court found no evidence to support this claim and stated that any such motivation, if it did exist, was irrelevant if conditions justified the enactment of the ordinance. McCarthy v. City of Manhattan Beach, 41 C.2d 879, 264 P. 2d 932 (1953).

CHAPTER 11

The Practical Dimension- Where do We Go from Here?

1. Introduction

Recent years have witnessed a flood of coastal resource management activity at the state level, as programs have been developed in the areas of wetlands preservation, beach access, power plant siting, shorelands zoning, site location and regulation, comprehensive planning, and comprehensive management.[1] Some states have acted with a sense of urgency to check the trends in development while state policy is formulated and debated in the legislature and among the citizenry. For example, California voters recently approved by referendum the now-famous "Proposition 20" which prohibits any development in the area between the seaward limits of state jurisdiction and 1000 yards landward from the mean high tide line, unless a permit has been obtained from the newly-created state or regional coastal conservation commission.[2] If we were

[1] See generally, Armstrong & Bradley, Description and Analysis of Coastal Zone and Shoreland Management Programs in the United States, U. of Michigan Sea Grant Program, Technical Report No. 20, (March 1972).

[2] Proposition No. 20, "Coastal Zone Conservation Act", Propositions and Proposed Laws, General Election, Tuesday, November 7, 1972, California.

to look for a common element among the programs that have emerged to date, a central theme, one would find that all are based on the fundamental insight that the value of environmental resources transcends jurisdictional boundaries, especially at the local level. The basic institutional premise of all coastal resource management efforts is that resource use decisions of more than local significance cannot be made solely on the basis of local needs and values. Thus, a broader base of governmental responsibility - centered at the state level - has evolved during what has been termed a "quiet revolution" in the control of land,[3] the nucleus of all environmental resource systems. But now the revolution is nearly over and we are confronted with the awesome task of developing new and effective management processes that will prove, in the long run, to be better than the old ones. Whether or not a "counter-revolution" takes place will depend in large measure on the sophistication of the policy techniques that are developed over the next decade or so, and the success they have in dealing with extremely complex issues.

Decreasing open space for public recreational use is a prototypical coastal resource management problem. In the first place, there has been a conspicuous absence of any regional perspective as to the value of beaches and other recreational resources. While an arsenal of legal tools are available to preserve seashore areas for future public use, the regula-

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[3] See generally, Bosselman and Callies, The Quiet Revolution in Land-Use Control, U.S. Council on Environmental Quality (Gov't. Prining Office, Washington, D.C. 1971).

tory approach has not been widely adopted, and the reasons for this are basically political, not legal. It is frequently noted in the literature that open-space regulations at the local level tend to be least effective when the pressure for development is high, and this is characteristic of the shoreline situation. As would be expected, local political subdivisions have generally responded only to local concerns regarding maintenance of the property tax base, reservation of facilities for exclusive municipal use, etc.; and state and federal efforts have been a classic case of too little and too late. Secondly, any suggestion of expanding public recreational opportunities raises a host of complex issues of a practical nature. This report has focused on the relatively narrow strip centered about the land-sea interface, i.e. the recreational resource itself. The prospect of widespread public use of the resource, however, must be considered within a much broader geographical context. More public use means that more parking lots, transportation facilities, hotel and motel accommodations, and many other recreation-related developments will be required in the zones immediately adjacent to seashore areas. The effects of such development could reverberate throughout the surrounding regions, bringing increased congestion and greater police problems in areas already overburdened with seasonal demands for municipal services. This raises questions concerning the equitable distribution of benefits and costs, and what is the socially-optimal allocation of the resource base. How are trade-offs to be identified and evaluated, and at what point should an expansion of public opportunities in coastal areas stop? This will depend to some extent on the range of recreational alternatives available at inland facilities and on the willingness of the public to

substitute other forms of recreation, e.g. backyard pools, etc. It will also depend on a more precise evaluation of the opportunities lost by devoting additional resources to public as opposed to private use. All this is to say nothing, of course, of the extremely important ecological dimension. Many commentators feel that the guiding principle of any coastal zone management program should be that land and water use must be managed so that it does not exceed the ecological capability of the land to support development.[4] With regards the ecological effects of recreation use, it has been suggested that good arguments exist to the effect that leisure-home subdivision and similar high-density private development can maximize use more efficiently than public development.[5]

The foregoing observations are not by any means intended to diminish the conviction that public recreational opportunities in the coastal shorelines are underproduced. The purpose is to indicate the complexity of adjusting the institutional system to correct such a situation without introducing additional disruptions that could counterbalance any benefits achieved. The question, then, is: Where do we go from here? Certainly the states must embark on ambitious programs of data collection, including inventories of physical resources and analyses of socio-economical and technical data that will aid in the assessment of the implications of alternative policy strate-

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[4] See, e.g. Schoenbaum, "Public Rights and Coastal Zone Management," 51 N.C. L. Rev. 1, at 26-27 (1972).

[5] See Teclaff and Teclaff, "Saving the Land-Water Edge From Recreation, for Recreation," 14 Arizona L. Rev. 39, at 60. See also Kusler, "Artificial Lakes and Land Subdivisions," 1971 Wis. L. Rev. 369, at 370-373.

gies. Beyond this, however, lie the three most difficult issues yet to be faced in coastal zone management, and in environmental resource management in general. These concern: (1) the relationship between government action and the private market; (2) the relationship between various levels of government; and (3), the relationship between the legal system and the administrative sectors of government. This report cannot conclude without some general observations on each of these matters.

2. Private Market vs. Government Action

As noted, the path of coastal resource management is at a crucial juncture, and the first question that arises is: Can the organization of economic and political activity be revised in such a way as to make the distribution of coastal resources among competing uses more representative of social values, more responsive to public needs? This is the issue of designing an allocative system and defining an effective mode of governmental participation in it. As long as there was plenty of shoreline available to satisfy all the demands from competing private uses while leaving adequate opportunities for public activities, there was no perceived need to reassess the distribution of functions between the public and private sectors. The public sector was content with acquiring and managing public lands and otherwise adopting a laissez-faire posture in setting the boundary constraints for private sector decisions. But today, with the increasing concentrations of population and development in the coastal zone and the rapidly diminishing supply of resources to accommodate the needs attendant to this growth, deficiencies in this allocative system have become more pronounced, especially in relation

to ecological and amenity values. As a result of apparent market imperfections, the nature of the interface between the public and private sector is changing significantly, and government is being required to play a more integral role in allocative processes. Unfortunately, scant attention has been devoted to understanding the effects that a reallocation of roles and functions between the public and private sectors will have relative to the concept of efficiency and social balance. We are just beginning to acknowledge that while private market mechanisms can be inadequate in dealing with problems at the public-private interface, public sector methods may be at least as bad or even worse. Basically political, adversarial processes may not be any better than market processes in terms of allocative efficiency; in fact, certain forms of limited-mandate public control can lead to resource allocations that are consistently worse than what an unfettered market would provide.[6] In the case of shoreline resources, the market has clear imperfections with regard to public recreational use, and this provides a rationale for government intervention. If the processes of government were efficient in translating the public interest into tax dollars to be spent on beaches and other facilities, the public would be put on a co-equal basis with private bidders and normal market forces would take over to assign priorities of use. But this does not happen because many of the same factors that discourage private investment from providing recreational facilities apply to

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[6] See, e.g. Ducsik "The Allocation of Boston Inner Harbor: A Case Study in Resource Management," Report of the Shoreline Development and Pollution Subcommittee of the Ocean Resources Task Force, at 37, Massachusetts Secretary of Environmental Affairs (Sept. 1972).

government as well, i.e. the values and demands of a diffuse public many be impossible to identify or too costly to collect. The point is that wholesale rejection or preemption of any one decision-making component in the allocative system is not likely to solve problems of resource misallocation. What is required is a careful analysis of the strengths and weaknesses of each component and how they might be co-ordinated in a way that retains as many positive aspects and eliminates as many negative aspects of each as is feasible.

3. State vs. Local Control

The second major issue facing the states in developing coastal resource management programs is the design of intra-government organizational structures which will govern the flow of policy, planning, and implementation responsibilities between state and local (or regional) levels. To put this in proper perspective, we should point out that a recent American Law Institute report has indicated that 90 per cent of the land-use decisions currently being made by local governments have little or no significant impact on state or national interests.[7] While this percentage is undoubtedly much higher in coastal areas where a greater portion of the resources are of more than local value, there is no conclusive evidence to suggest that management by state fiat is required as a matter of a broad policy. Even though it is clear that many existing decision processes at sub-state levels are inadequate insofar as coastal resources are concerned, it does not follow that wholesale rejection of these processes is necessary. Although ultimate

[7] American Law Institute, Model Land Development Code (Tent. Draft No. 3, 1971).

decision-making at the state level is desirable in some cases, the general rule should be that co-operation in good faith should come before pre-emption, i.e. the carrot before the stick. An innovative precedent in the case of shoreline recreation resources can be found in the federal legislation establishing the Cape Cod National Seashore in Massachusetts.[8] Instead of attempting to acquire all the shorefront envisioned for the park, the Congress authorized the establishment of criteria to be followed by local towns within the proposed seashore area in the drafting of land-use control ordinances.[9] Not only did this obviate the need for considerable expenditures by the federal government, it also enabled littoral properties to remain on the tax rolls. In the event that compliance with the federal criteria was not forthcoming from a given town, the Secretary of the Interior was authorized to acquire the needed lands. This formula seems to strike a workable balance between co-operation and co-ercion as between the different levels of government involved.

4. Legal Constraints vs. Administration Flexibility

The third issue of great importance to the effectiveness of any coastal resource management program is the attitude taken by the courts in applying legal constraints to administrative action. This has special signi-

[8] See generally, 16 U.S.C., s. 459h et seq.

[9] The towns of Chatham, Provincetown, Truro, Wellfleet, Eatham, and Orleans all have adopted the required land-use regulations. See, e.g. Town of Chatham, Mass., Protective By-Laws, sec. 3.5 (Residence-Seashore Conservancy District 10 - 1969).

ficance in the case of regulatory approaches to the preservation of unique shoreline recreation resources, where the issue of taking without due compensation may pose considerable difficulty. Historically, the criteria developed by the courts in this regard were intended to safeguard the rights of individual property owners against arbitrary, unfair, and tyrannical government action. Prof. Sax, in his early article on the taking question,[10] argued that resource-acquisition by government presents a three-fold source of danger: (1) the risk of discrimination ("the official procurement process provides a particularly apt opportunity for rewarding the faithful or punishing the opposition"); (2) the risk of excessive zeal ("government involved in pursuing an important national goal ... may be prone to display a questionable zeal in acquiring the tools needed to get on with the job"); and (3) the risk of excessive exposure to losses ("a good argument can be made that the proper way to draw the line limiting exposure to losses is with the distinction between the demands of private competition and those of resource-seeking government enterprises.").

While the above dangers will always exist, it has become clear with the advent of the environmental movement that more diffuse rights on the part of the general public require protection similar to that traditionally accorded to private interests. Conventional notions of land-use spillovers affecting adjacent properties or an identifiable segment of the public at large have given way to a more sophisticated understanding of the inter-

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[10] Sax, "Taking and the Police Power," 74 Yale L. J. 36, at 64-65 (1964).

connectedness of seemingly discrete resource uses.[11] This has posed renewed difficulty for the courts, since the concept of "external harm" now clearly encompasses a broad range of public interests that are not always readily identifiable or quantifiable.

Faced with dilemmas of this sort, it becomes necessary to reconsider the notion of property rights as the central element in the regulation/taking issue. Such a reconsideration has, in fact, led Sax to a reformulation of his original theory:

> The abandon with which private resource users have been permitted to degrade our natural resources may be attributable in large measure to our limited conception of property rights. Not surprisingly, an amended notion of property rights suggests a reformulation of the law of takings. Perhaps more importantly, a new view of property rights suggests that current takings law stands as an obstacle to rational resource allocation.[12]

In disowning his original view that whenever government can be said to acquire resources on its own account, compensation must be paid, Sax asserts that much of what was formerly deemed a taking is better seen as an exercise of the police power in vindication of diffusely-held claims ("public rights") to a common resource base. These rights are in jeopardy when the use of property has spillover effects on other property interests,[13] and should be entitled to equal consideration in legislative or judicial resolution of conflicts

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[11] This view of land and other environmental assets as resources and not just commodities is discussed in Bosselman and Callies, op. cit. note 3 supra, at 314-316.

[12] Sax, "Taking, Private Property, and Public Rights", 81 Yale L. J. 149, at 150 (1971).

[13] Conflict-creating spillover effects are categorized as: 1) uses of property resulting in direct encumbrance on the uses of other property; 2) uses of a common to which others have an equal right; or 3) the use of property that affects the health or well-being of others. Id., at 162.

that arise as a result of these spillovers. The purpose of public sector activity, then, "is to put competing resource-users in a position of equality when each of them seeks to make a use that involves some imposition (spillover) on his neighbors.."[14] Essentially, this recognizes that the roles of government as mediator and as participant in the economic system often overlap when conflicts arise between private interests and public rights. Government must seek to mediate these conflicts, but in doing so it must also represent those diffuse public interests which would otherwise be left ignored.[15] If the courts are to avoid disrupting the effectiveness of these processes, Sax feels they should confine their questions in determining whether or not compensation is due to:(1) whether or not an owner is being prohibited from making a use of his land that has no conflict-creating spillover effect; and (2) whether or not government is guilty of discriminatory action.[16] The great advantage of this approach is that it decouples the taking issue from any artificial categorization of the modes of government activity vis-a-vis the economic system. This allows government a greater flexibility in balancing diffusely-held claims vs. traditional property interests, a complex task that the courts are probably ill-equipped to assume [17] and reluctant to engage in.

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[14] Id., at 161.

[15] "The essence of a public rights .... approach to the question of takings should make clear that the government should vindicate the rights of taxpayers as a group as well as the rights of individual property owners." Id., at 171.

[16] Id., at 176.

[17] At least one other commentator is convinced that balancing tests are too difficult for the courts to apply. See Michelman, "Property, Utility, and Fairness: Comments on the Ethical Foundations of Just Compensation", 80 Harv. L. Rev. 1165 (1967).

At the same time, courts can focus more explicitly on developing rules to protect against governmental abuse of discretion.[18] While Sax acknowledges that legislative decision-processes are not always rational, he points out that the relevant issue is whether conventional rules will make the process more rational. But clearly they do not:

> .... the current takings scheme introduces an irrationality by requiring compensation when the conflict resolution system imposes extreme economic harm on discrete users but not when analoguous harm is placed on diffuse users. The proposed scheme has the advantage of making competing uses doctrinally equal, leaving their accommodation to be decided as a matter of public policy rather than of inflexible legal rules.[19]

These observations have some very important implications for the shoreline recreational situation. While the courts have begun to substitute a balancing test for the traditional benefit-compelling vs. harm-preventing criteria in open space litigation, inevitably this balancing test will become too complex for the courts to deal with. How can the diminution in value of a regulated littoral property be compared within a legal context to the aesthetic or recreational value gained for the public at large? Such trade-offs are meant for political and administrative processes, and the law must develop a more sophisticated approach that can both maintain administrative flexibility while guarding against potential abuses of discretion.

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[18] On the question of arbitrary and discriminatory government regulation, Sax analogizes to the judicial rules developed to prevent spot zoning. On the question of excessive zeal in seeking broad social objectives, he points out that the courts are greatly aided by political checks on decision-making processes which would not allow the "public interest" to routinely prevail over traditional private rights. Sax, op. cit., note 3 supra, at 170-171.

[19] Id., at 172.

5. Finale

Finding manageable solutions in the three problem areas outlined above will obviously be a tall order. What is involved is nothing less than an attempt to bring some form of an integral perspective to bear on environmental problems that take place within an extremely decentralized social environment. The task is grandiose, the techniques are immature, and successful implementation is not assured; but the effort is justified by the enormity and complexity of these problems, which are but the precursor of things to come for industrial society.